

Plain-English Drafting for the Age of Statutes

By Douglas E. Abrams

A generation ago, Professor Guido Calabresi chronicled the “statutorification” of American law.¹ Within a few decades, he explained, the nation had moved “from a legal system dominated by the common law to one in which statutes, enacted by legislatures, have become the primary source of law.”²

A quick visit to a law library confirms the dominance of legislation today. Annual compilations of the United States Statutes at Large and the Michigan Session Laws now dwarf their slim counterparts for any nineteenth-century year, and the United States Code and the Michigan Compiled Laws Annotated now consume entire shelves. The volumes’ hefty indexes underscore the sheer breadth of subjects that federal and state legislation address, a spectrum wider today than ever before. Adding to this heft are the codes, charters, and ordinances enacted by city councils, boards of supervisors or commissioners, and similar local legislative bodies from coast to coast.

We live (as Calabresi put it) in the Age of Statutes, when legislative drafting inti-

mately affects our public and private lives.³ Because citizens with law degrees hold no monopoly on our statute books based on consent of the governed, lawmakers should strive to express themselves in plain English from initial drafting through enactment. The British and Scottish Law Commissions state the core aspiration: “[A] statute should be drafted so that it ‘can be understood as readily as its subject matter allows, by all affected by it.’”⁴

Baby Talk?

Some critics scoff at calls to draft legislation in plain English.⁵ The gist of the critique is that statutes speak not to lay readers, but to lawyers and judges whose law-school training equips them to grasp legal nuance and technicality. “The language of our legislation,” says one critic, “cannot be reduced to baby talk for consumption by the masses.”⁶

I recognize that statutes make bad bedtime reading and do not deliver the sort of entertainment we normally expect from the books and articles we choose to read. I recognize, too, that intricate legal doctrine sometimes resists expression in plain English. Tradition may also thwart plain English when a bill amends isolated sections of opaque chapters whose language and judicial interpretations tie the hands of drafters who would opt for greater simplicity if they were starting fresh.

Despite these roadblocks sometimes posed by intricacy or tradition, critics who denigrate the general role of plain English in legislative drafting belittle a core purpose of statutes in our representative democracy: By making laws more comprehensible, plain English helps law-abiding people play by the rules.

In my state, the Missouri General Assembly’s Joint Committee on Legislative Research has it right: “The essentials of good bill drafting are accuracy, brevity, clarity, and simplicity.”⁷ These essentials acknowledge that legislative drafters, like other writers, do not speak in isolation; they speak to an audience. A statute’s audience typically includes both lawyers and nonlawyers, and the second group sometimes outnumbers the first. Plain English enhances clarity and understanding for both groups.

The Legislature’s Audience of Lawyers

Legislative drafters write for judges who interpret statutes, lawyers who counsel and advocate their clients’ causes, public-sector lawyers who administer the laws, and lawyers who are regulated in their businesses or other affairs. Lawmakers advance the sound administration of justice when, to the extent possible, they enact standards comprehensible to this diverse legally trained audience.

Some imprecision is inescapable in the legislative process, and some may even be



“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. Contact Prof. Kimble at kimblej@cooley.edu. For a list of previous articles, go to www.michbar.org/generalinfo/plainenglish/columns.cfm. 2009 is a notable year for the column.

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deliberate. “Anything that is written may present a problem of meaning,” Justice Felix Frankfurter observed, because words “seldom attain[] more than approximate precision.”⁸ But there is more. Even a bill drafted with reasonable clarity may be cobbled by many hands during the give-and-take of committee hearings and floor debate along the tortuous path to enactment. Reflecting on his eight years in Congress, Judge Abner J. Mikva explained that “it is not easy to get 535 prima donnas to agree on anything. To get two separate majorities to agree separately on a single set of words to convey a clear and complete idea—and then to get the President to sign such a miracle—is not easy.”⁹

To compound this inherent potential for imprecision, legislative sponsors striving to preserve fragile coalitions for a controversial bill sometimes resort to what Justice William J. Brennan, Jr. called “studied ambiguity,” ill-defined standards “deliberately adopted to let the courts put a gloss on the words that the legislators could not agree upon.”¹⁰ (In football, such deliberate action is called punting, and it’s designed to produce strategic advantage.) Lawmakers can equivocate or compromise, but the rules of jurisdiction normally require courts to decide cases, even when the decision turns on a statute whose language appears puzzling or incomplete.

Throughout the legislative process, fidelity to plain English increases the likelihood of statutory interpretation true to the majority enactors’ intent. “[P]lain language is *more* precise” than its alternatives “because it uncovers the ambiguities and errors that traditional style, with all its excesses, tends to hide” until it is too late.¹¹ Justice Ruth Bader Ginsburg says that statutory interpretation often divides an appellate court when “murky” legislation obscures rather than clarifies meaning.¹² The Ginsburg critique reminds us that obscurity is obscurity, even when the reader displays a law degree or judicial commission on the office wall.

The Legislature’s Audience of Nonlawyers

The legislative drafter’s lay audience begins with sponsors and other lawmakers

themselves, many or most of whom in a typical Congress or state or local legislature are not lawyers. Legislators may debate and then vote based on understanding gleaned from staff members’ written summaries, but reliance on these secondary sources brings risk when the bill and not the summary becomes law.

Following enactment, a statute’s application and enforcement may depend on decision-making by public officials who have no formal legal training or sustained access to a legal staff. Business people and other nonlawyer professionals also frequently consult statutes that regulate their affairs.

The legislative drafter’s lay audience typically extends even further, however, to people from all walks of life whom the enactment may affect, a class that may number in the thousands or more. Congress and most legislatures recognize this extended audience by posting filed bills, and the codes themselves, on their official websites for downloading and inspection by the general public.¹³ City councils and local boards of supervisors or commissioners also typically post their charters, codes, and ordinances.

Dean Roger C. Cramton is right that “[s]impler statutes and regulations written in ‘plain English’ might be more readily followed without resort to professional advice.”¹⁴ As I spend time in the University of Missouri School of Law library down the hall from my office, I often see the staff assisting members of the general public who wish to examine the statute books, as the general public has every right to do. Law and lawyers are expensive, most people seek to avoid litigation, and self-representation remains a right in most circumstances.

In some fields of law, people often cannot afford professional advice, or may feel more comfortable with self-representation. I teach in one such field, family law. According to surveys in some jurisdictions, at least one spouse litigates without a lawyer in more than half of divorce cases, often because the spouse finds representation too costly or intrusive.¹⁵ The divorce act, a statement of public values sculpted by elected representatives over time, should remain at least as accessible as commercial “do it yourself” books sold in local discount stores.

Lay readers may learn about statutory law from summaries of particular fields written (in plain English, by the way) by a federal or state agency or a bar association. These summaries may be requested by telephone or mail, and they typically appear on the Internet, supplemented by answers to FAQs (frequently asked questions).¹⁶

Some fields of law, such as the federal antitrust laws and much state legislation implementing complex federal mandates, have become so intricate that these unofficial plain-English summaries may provide the lay public’s most realistic opportunity for understanding without counsel.¹⁷ But agency or bar-association publications should complement rather than supplant the legislature’s own efforts to demystify the law.

The Legislative Drafter’s Presumption

Legislative drafters should begin writing from the presumption that plain English would enable lay persons potentially affected by the bill to grasp its meaning. That presumption remains rebuttable, but only

for strong reasons because (as the Uniform Law Conference of Canada recommends) “[a]n Act should be written as much as possible in ordinary language, using technical terminology only if precision requires it.”¹⁸

This legislative drafter’s presumption is a logical corollary of a presumption already well-established: “Persons are conclusively presumed to know the law” and thus may not plead lack of knowledge when they deal with the government or defend a civil or criminal proceeding.¹⁹ Conclusiveness actually makes the latter “presumption” a rule of law, commonly expressed as “ignorance of the law is no excuse.” For the rule to approach reality rather than survive merely as a legal fiction, lawmakers should give lay people—that is, most people—a fair chance to understand the legislation that the legal system conclusively presumes they understand.

Understanding depends on access, which means more than simply the right to inspect bills or statutes in a public law library or on an official website. Access also means making reasonable efforts to enable citizens, to the extent possible, to read a bill or statute with some fair opportunity to figure out generally what it says.

Most citizens, of course, navigate legislative waters without benefit of a formal legal education. But access grounded in plain English enhances the capacity of lay readers to provide their elected representatives commentary about bills, and then to conform their conduct to the statute or decide whether to secure a lawyer’s professional assistance. That most people will not seek out these opportunities does not diminish the entitlement of the people who do.

An Australian government minister, a strong proponent of plain-English drafting, recently acknowledged that when legislation concerns particularly complex legal doctrine, lawmakers sometimes must strike “a delicate balance between . . . simplicity . . . and . . . comprehensive coverage.”²⁰ The balance might tilt against plain English in a particular case, but Professor David Mellinkoff provides a sound rationale for the legislative drafter’s presumption favoring simplicity in the absence of convincing rebuttal: “With communication the object, the principle of simplicity would dictate that the lan-

guage used by lawyers agree with the common speech, unless there are reasons for a difference. . . . If there is no reason for departure from the language of common understanding, the special usage is suspect.”²¹

Conclusion

Calls for plain-English drafting date at least from the late sixteenth century, when King Edward VI urged Parliament to make statutes “more plain and short, to the intent that men might better understand them.”²² “[T]he first end of a writer,” English Poet Laureate and literary critic John Dryden counseled in 1700, is “to be understood.”²³ This first end is as central today as it was during the Age of Dryden three centuries ago. In most circumstances, “[t]he simplest English is the best for legislation.”²⁴ Plain English invigorates any writing. Inside or outside the halls of the legislature, writers should strive for nothing less. ■

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FOOTNOTES

1. Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass: Harvard Univ Press, 1982), p 1 (now Circuit Judge, U.S. Court of Appeals for the Second Circuit).
2. *Id.* See also Hurst, *Dealing With Statutes* (NY: Columbia Univ Press, 1982), p 1.
3. Calabresi, n 1, *supra*. See also Gilmore, *The Ages of American Law* (New Haven, CT: Yale Univ Press, 1977), p 95 (discussing the twentieth-century “orgy of statute making”).
4. Dale, *Legislative Drafting: A New Approach* (London: Butterworths, 1977), p 331.
5. Hunt, *Plain language in legislative drafting: An achievable objective or a laudable ideal?*, 24 Statute L R 111, 114–16 (2003), available at <<http://www.plainlanguagenetwork.org/conferences/2002/legdraft/legdraft.pdf>>. All websites cited in this article were accessed May 7, 2009.

6. Hunt, *Plain language in legislative drafting: Is it really the answer?*, 23 Statute L R 24, 44 (2002).
7. Missouri General Assembly Committee on Legislative Research, *The Essentials of Bill Drafting in the Missouri General Assembly* (Jefferson City, MO, 2002), p 1.
8. Frankfurter, *Some reflections on the reading of statutes*, 47 Colum L R 527, 528 (1947), reprinting Frankfurter, *Sixth annual Benjamin N. Cardozo lecture*, 2 Rec Bar Ass’n City of NY, No. 6 (1947).
9. Mikva, *Reading and writing statutes*, 48 U Pitt L R 627, 636 (1987).
10. Brennan, Jr., *Some thoughts on the Supreme Court’s workload*, 66 Judicature 230, 233 (1983).
11. Kimble, *Writing for Dollars, Writing to Please*, 6 Scribes J Legal Writing 1, 2 (1997) (emphasis in original).
12. Ginsburg, *Inviting judicial activism: A “liberal” or “conservative” technique?*, 15 Ga L R 539, 547 (1981).
13. Missouri Senate <<http://www.senate.mo.gov/>> (click on “Session Information”); Missouri House of Representatives <<http://www.house.mo.gov/default.aspx?info=/link2/bill.txt>>; Missouri General Assembly <<http://www.moga.mo.gov/>>.
14. Cramton, *Delivery of legal services to ordinary Americans*, 44 Case W Res L R 531, 562–563 (1994).
15. Abrams et al., *Contemporary Family Law* (2006), pp 51–52.
16. See, e.g., U.S. Dep’t of Health and Human Services <<http://www.os.dhhs.gov/>>; Missouri Dep’t of Labor and Industrial Relations <<http://www.dolir.mo.gov/>>.
17. U.S. Federal Trade Comm, *Promoting Competition, Protecting Consumers: The Bureau of Competition 2008 User’s Guide*, available at <<http://www.ftc.gov/bc/BCUsersGuide07.pdf>>.
18. Dick, *Legal Drafting in Plain Language* (3d ed, 1995), p 229 (quoting § 31 of the Legislative Drafting Conventions of the Drafting Section of the Uniform Law Conference of Canada).
19. *Missouri Highway & Transp Comm v Myers*, 785 SW2d 70, 75 (Mo, 1990); see also, e.g., *Cannon v University of Chicago*, 441 US 677, 696–697; 99 S Ct 1946; 60 L Ed 2d 560 (1979); *Garr v Countywide Home Loans*, 137 SW3d 457, 462 (Mo, 2004).
20. Debates of the Legislative Assembly for the Australian Capital Territory, Hansard 3836 (October 16, 1991) (comments of Mr. Connolly, Attorney-General, Minister for Housing and Community Services and Minister for Urban Services), <<http://www.hansard.act.gov.au/hansard/1991/pdfs/19911016.pdf>>.
21. Mellinkoff, *The Language of the Law* (1963), p vii.
22. Debates of the Legislative Assembly, *supra* n 21, at 3837 (comments of Mr. Connolly, quoting King Edward VI).
23. Dryden, *Preface to Fables, Ancient and Modern* ¶10 (1700), reproduced in *The Harvard Classics, Famous Prefaces* (1909–1914).
24. Russell, *Legislative Drafting and Forms* (UK: Butterworths, 1938), pp 12–13 (footnotes omitted).