Plain Isn't Plain

By Mark Cooney

We have only ourselves to blame, we advocates of plain language. It's that word *plain*. It sounds so . . . so . . . plain. There's no denying the word's negative connotations. *Plain* brings to mind things lacking beauty or sophistication—bland things. So when legal professionals hear the cry for plain language, many envision legal documents that won't get a prom date, that won't go to the symphony, that won't have any pepperoni on top.

When we call it *plain* language, we also mean that it's *clear* language, *strong* language, *direct* language, and *confident* language. Those words have a positive vibe. They connote power. And that's exactly what plain-language legal writing has. It isn't plain at all, if by that you mean dull and drab. It's refreshing, persuasive, interesting, and sometimes colorful. It has strength and, yes, beauty.

Let's start with strength. Ask the Ninth Circuit whether it thought plain language lacked punch when it read this sentence in a Supreme Court opinion:

> The Court of Appeals was wrong, and its decision is reversed.[1]

The plain word rocks you to the core: you were *wrong*. A more elevated alternative (*committed reversible error*) would only weaken the message, making it softer and more abstract. And you might prefer softer sometimes. Unlike the Chief Justice of the United States (who wrote that sentence), we mortals might shy away from telling an appellate panel that a respected lower-court colleague was *wrong*. And that just proves my point: it's a fallacy that plain words are weak words. Plain strengthens. Inflation weakens. Too many lawyers think the opposite. They're wrong.

And is plain language really an ugly duckling? Can a lawyer, judge, or scholar write with flourish and flair using "plain little words"? Consider this passage fleshing out the common-law hearsay exception for so-called verbal acts, which the writer calls "performatives":

> In a baseball game, after a close play at third base, the umpire raises his right hand with thumb extended and bellows, "Y're out!" Those words are a performative; by speaking them, the umpire *did* something. His words *made* the runner out. What if the same two words had been bellowed at the same moment by a beer-soaked fan in the stands? Then they would not be a performative, but merely a narration of what the fan perceived.[2]

That's not dull or lifeless, is it? You can almost taste the Cracker Jack. Yet it contained only a single four-syllable word—*performative*—that appeared only twice and, in this context, was a term of art that couldn't be sacrificed. Other than that term of art, the writer used only two words with more than two syllables: *extended* and *narration*. He used each of them only once, and neither is stuffy or intimidating. In short, that passage was written in plain language, yet it shined. Richard Wydick wrote it. He also wrote the landmark book *Plain English for Lawyers*.

Works by great nonlegal writers also prove that small, plain words can bring a page to life:

> A barn, in a day, is a small night. The splinters of light between the dry shingles pierce the high roof like stars, and the rafters and crossbeams and built-in ladders seem, until your eyes adjust, as mysterious as the branches of a haunted forest.[3]

That was by John Updike, and 32 of his 45 words were one syllable. The rest were only two syllables, except for *mysterious*.

But oh, what a picture he painted.

Small, plain words aren't dull. When selected and arranged with care, they are the colors that make great art.

The next example's charms are more subtle. This one won't conjure the sights and sounds of a sundrenched ballpark or a rustic barn, but its tone is confident and direct. It reflects plain language's greatest value to writers and readers: clarity. The issue on appeal was whether a trial judge properly rejected a prisoner's attempt to sue without

Is plain language really an ugly duckling? Can a lawyer, judge, or scholar write with flourish and flair using "plain little words"?

"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. 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 an index of past columns, visit www.michbar.org/generalinfo/plainenglish/.

Small, plain words aren't dull. When selected and arranged with care, they are the colors that make great art.

liability for costs. The answer hinged on whether the prisoner was in "imminent danger of serious physical harm" when he sued:

> But the judge's reasoning was incomplete because it ignored the alleged beating. Although the beating (if there was a beating) occurred before Fletcher sued, an untreated wound, like an untreated acute illness, could pose an imminent danger of serious physical harm. Interpreted generously, this is what his pro se complaint alleges.[4]

What makes this writing so crisp? A lot of little things. The writer began a sentence with *But*, which allowed him to quickly signal contrast and then move on. He used the strong word *because* instead of the flabby *for the reason that* or *due to the fact that*. He wrote *before* instead of lapsing into *prior to* or *prior to when*. He chose *sued* instead of wordy alternatives like *commenced suit*, *initiated his action*, or *brought suit*. The writer also had the confidence to call the beating a *beating*, instead of the more abstract *assault*, *physical assault*, or *battery*. Those terms of art weren't necessary here, so the writer wisely avoided them because the lawspeak version—*assault*, for example—dilutes the concept. (We've all read and heard *assault* so often that it hardly sounds painful anymore.)

United States Court of Appeals Judge Richard Posner wrote that one.

Now, all legal writing can't be conversational and vivid. What may fly in court briefs, opinions, or articles, where legal writers often flesh out rules as Wydick did above, won't fly in contracts or statutes. But I ask you this: Have you ever read a wordy, legalese-infused commercial contract, corporate bylaw, promissory note, zoning ordinance, or statute and found beauty or grace in it? Has the inflated language and wordiness made those documents inspiring or artistic? Sophisticated? Are they grand expressions of the English language's rich potential?

Clearer, more direct language—plain language—at least makes them easier to read and understand.

Beautiful. ■

This article is reprinted from the Winter 2012 edition of The Scrivener.

Mark Cooney is a professor at Thomas M. Cooley Law School, where he teaches legal research and writing. Before joining the Cooley faculty, he spent 10 years in private practice as a civil litigator, most recently with Collins, Einhorn, Farrell & Ulanoff, P.C., in Southfield.

FOOTNOTES

1. *Winter v Natural Resources Defense Council, Inc*, 555 US 7, 12; 129 S Ct 365; 172 L Ed 2d 249 (2008).
2. Wydick, *True Confessions of a Diddle-Diddle Dumb-Head*, 11 Scribes J Legal Writing 57, 71 (2007).
3. Updike, *Pigeon Feathers*, The New Yorker, August 19, 1961, at 25.
4. *Fletcher v Menard Correctional Center*, 623 F3d 1171, 1173 (CA 7, 2010) (citations omitted).