

Wrong—Again—About Plain Language

By Joseph Kimble

In a way, you have to admire someone who has spent almost two decades campaigning against plain language—unsuccessfully—and who still carries on. As Jack Stark acknowledged in his most recent foray,¹ “many statutory drafters have accepted the school and use its precepts.” Maybe that’s because the school and its precepts have something important to offer—even to respected veteran drafters like Mr. Stark.

What’s troubling is to see the recirculation of criticisms that are demonstrably false and that have been answered so many times. You have to wonder: how could anyone who knows the plain-language literature keep trotting out these inaccuracies and arguments? It’s hard to figure.

At any rate, before I take on each of these mischaracterizations of plain language, I’ll go right to the make-it-or-break-it point.

The charge: plain language generates errors.

Mr. Stark anchors his criticism on a before-and-after example from an Internet plain-language site. He rattles off a series of pronouncements about changed meaning, asserts that “the proof is in the pudding,”

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and finds unpalatable “a method of drafting that generates so many errors.”

Let’s set aside the multitude of successful plain-language projects around the world² and the endless stream of examples that advocates have put forward for at least 50 years, beginning with David Mellinkoff.³ Let’s accept the questionable premise that one unsuccessful piece of plain drafting raises doubt about all the other ones. Let’s look at this supposedly half-baked pudding.

It’s Title 12, Section 602.16, of the U.S. Code of Federal Regulations. Here’s the before and after:

Aggregating Requests. A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Farm Credit Administration reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Farm Credit Administration may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

Combining Requests. You may not avoid paying fees by filing multiple requests at the same time. When FCA reasonably believes that you, alone or with others, are breaking down a request into a series of requests to avoid fees, we will combine the requests and charge accordingly. We will assume that multiple requests within a 30-day period have been made to avoid fees.

First point: the revision was adopted in 1999, after publication and an opportunity

for public comment. At the time, the agency said the new rule “amends FCA [Farm Credit Administration] regulations on the release of information under the Freedom of Information Act to [among other things] reflect new fees.”⁴ So lo and behold, it’s quite possible that any changes from the previous version were intended. Or it’s possible that any differences were considered insignificant in practice.

Now for the substance. And here we need to know the context. People must pay a per-page fee for requests, but they get the first 100 pages free. Hence Section 602.16, designed to prevent people from avoiding fees by splitting up a single request into multiple requests for parts of a document or documents.

Here are Mr. Stark’s assertions (in the first sentence of each bullet) and my responses (in the paragraph following):

- “Aggregate, which means ‘add up,’ has been changed to *combine*, which means ‘blend together.’”

But *combine* also means “to unite into a single number.”⁵ That’s precisely what the drafters meant and how readers would understand that term in context.

- “Seeking portions of a document or documents has been eliminated; the rules now apply to any request.”

So is there a difference in practice? Mr. Stark doesn’t explain. If, before, you sought part of a document, that was considered a request. And it still is.

- “Solely has been eliminated, allowing other causes such as forgetting that a request has already been made and that the agency erred.”

Now, how likely is that? Does anybody forget a formal request under the Freedom of Information Act? And

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the original version applied to multiple requests “at the same time... solely... to avoid payment of fees.” So previous requests didn't even figure into the original version. Mr. Stark's point here is elusive.

- “*Acting in concert* has been replaced by *with others*, which includes requests made at the same time by chance and requests with several names on them.”

Acting at the same time by chance is not the same as acting “with” someone to avoid fees. And if a request has several names on it, the signers were presumably acting in concert, just as they were acting with others. In any event, the new wording won't cause the agency to reach a different conclusion than it would have under the old wording.

- “*Series...* has been replaced with *multiple...*”

No, it hasn't. In both versions, the first sentence uses *multiple requests*, and the second sentence uses *a series of requests*. Then the revised third sentence uses *multiple requests* again, consistent with its use in the first sentence. Mr. Stark says that *multiple* means “many, not more than one.” But in fact, it does also mean “consisting of...more than one.”⁶ This insistence on a single meaning for a word has now become a multiple error.

- “*Is attempting to break a request down* has been changed to *are breaking down a request*.”

Again, what does it matter? The original version was not distinguishing between attempting to break down and actually breaking down; it was not creating an “attempted” violation, like

attempted murder; it was not trying to identify an act that is separate from and occurs before actually breaking down a request. In short, the word *attempting* was superfluous in the original: it should have been *is breaking down a request*—exactly like the revised version. All the original did was open the door to a silly, unintended distinction.

- “*May aggregate* has been changed to *will combine*, which is a change from a permission to a requirement.”

Right, the agency obviously decided, as a matter of policy, to take a stricter approach. But even then, the agency presumably retains some measure of discretion.

- Multiple requests within 30 days now give rise to “an automatic assumption, not merely a consideration,” as in the original.

Once again, this change is so obvious that the agency drafters must have intended it. In fact, they changed from the indefinite *time period over which the requests have occurred* to a *30-day period*. Mr. Stark calls this change “inexplicable.” It's actually as clear as can be: the drafters wanted to be more specific.

All in all, then, the changes in meaning that Mr. Stark summons up are nonexistent, insignificant in practice, or deliberate. The revised version is not only shorter and clearer but also more accurate. *More* accurate, not less. And so it is that Mr. Stark's case against plain language comes unmoored.

Don't get me wrong: you can find mistakes and flaws in plain drafting. But anyone who enjoys that pursuit would have much more fun with old-style drafting,

where ambiguities, inconsistencies, and uncertainties flourish in all the verbosity and disorder. I took four examples from the old Federal Rules of Evidence and pointed out 33, 31, 18, and 28 drafting deficiencies in those examples.⁷ Finding a flaw in a plain-language statute or rule does not mean that plain language doesn't work or that we're stuck in reverse, with no choice but to draft in the arcane style so roundly criticized for centuries. An occasional mistake does not undo all the good and potential good.

The charge: plain language makes wrong assumptions and is “shot through with fallacies.”

Now we turn to the rest of Mr. Stark's criticisms, almost all of which are delivered without any supporting authority. Below is a brief response to each one.

- Advocates of plain language assume that “laypeople frequently read statutes.”

Not exactly. We think that “Acts... (and regulations too) are consulted and used by a large number of people who are not lawyers.”⁸ And we think drafters should make statutes and regulations intelligible to the greatest possible number of intended readers, especially those who are directly affected.⁹ Mr. Stark notes that people don't read the Internal Revenue Code. Of course not. It's a complete mess. (And it seems like an extreme example in any event.) But shouldn't people be able to read and understand—without travail—a regulation that tells them what the fee is for requesting information under the Freedom of Information Act (just to pick an example)? Who are laws for, after all? Only some clique of lawyers?

- Advocates assume that citizens “have a right to read simplistic statutes.”

Our view is not that simplistic. We do think citizens should have the greatest possible access to the law. Mr. Stark says that if one wants citizens to have that access, then provide “explanatory publications.” That's fine; we recognize the value and versatility of

citizens' guides.¹⁰ But why shouldn't the law be as clear as possible to begin with? Why make this an either/or choice? Besides, the clearer we make the law, the less need there will be for any sort of guide.

- “Most of [the] advocates are not professional drafters but academics and others who may never have drafted a bill.” Well, that would be news to legislative drafters in many countries—the UK, Ireland, New Zealand, Australia, Canada, Sweden, the EU, and others—who have endorsed plain language.¹¹ That would be news to the more than 1,000 members of the Commonwealth Association of Legislative Counsel—a group that “has helped promote plainer drafting around the world and share knowledge on how to go about it.”¹² Indeed, the past president of CALC and former head of the legislative-drafting offices in Hong Kong and Victoria, Australia, offers this declaration: “We shouldn't still be having to defend plain language in the twenty-first century.”¹³
- Advocates believe that “it is more important to be clear...than to be accurate.”

This charge could not be more wrong. I responded to Mr. Stark on this same point 18 years ago.¹⁴ No reputable advocate has ever said that clarity trumps accuracy. Yes, I have said, “Your main goal is to convey your ideas with the greatest possible clarity.”¹⁵ But *of course* I mean “convey your ideas accurately.” Nobody who knows my work—or the work of any other advocate—could possibly think otherwise. We all take the need for accuracy as blindingly obvious.¹⁶ But we do think that, with rare exceptions, clarity and accuracy are complementary—not competing—goals. As Reed Dickerson, the father of modern-day legal drafting, wryly put it: “The price of clarity, of course, is that the clearer the document the more obvious its substantive deficiencies.”¹⁷ Or in the words of another expert: “The purposes of legislation are most likely to be expressed and communi-

cated successfully by the drafter who is ardently concerned to write clearly and to be intelligible.”¹⁸ Time after time, we have seen clarity improve accuracy by uncovering the ambiguities and errors that traditional drafting tends to hide. Yet if in some instance, on some point, accuracy and clarity really are at odds, then accuracy wins. It goes without saying—almost.

- “Typically, there are lists of 10 or 12 [plain-language] rules, far too few for an enterprise as difficult as statutory drafting.” First, they are guidelines, preferences, principles—not inflexible rules. And the complete list of guidelines numbers in the dozens.¹⁹ Naturally, you will find top-ten lists and the like, as advocates try to pull out a handy set of especially important principles. But we are not so benighted as to think that that's all there is to it. We have always taken an expansive view of plain language, sought to ground it in research,²⁰ been open to reexamination, and realized that “bare guidelines are not enough.”²¹
- As an example of a rule that he says “makes no sense,” Mr. Stark cites the rule “to address *you*”—that is, to address readers as *you*. But here again, advocates do not insist on *you* in statutes. Rather, they recommend using *you* in consumer documents²²—including regulations—whenever doing so works. Ask yourself: Does *you* seem to work in the regulation we reviewed earlier? Is there any doubt that *you* refers to the person who is requesting information? In the right context, *you* is a great aid to readability. It puts readers in the picture.²³
- “[Another] fallacy is the command that short sentences should be used.” Nobody commands. We typically say to *prefer* short and medium-length sentences. Or we say to break up long sentences (one of the oldest and worst curses of traditional drafting) or a pattern of long sentences. Long sentences are not usually needed to connect

ideas. You can make connections in other ways.²⁴ You can use vertical lists. You can pull longish exceptions into new sentences. You can use patterns such as “The court may require.... Or the court may require....” There are lots of ways. It's telling that Mr. Stark doesn't give examples of long sentences that cannot be broken up. And by the way, look again at the revised regulation. Original: 27, 51, and 23 words (= 34 on average). Revised: 14, 31, and 17 words (= 21 on average).

- Mr. Stark criticizes my example of *give, devise, and bequeath* as redundant in a will. He says that “*give* denotes making a gift from one live person to another.” But certainly not in a will. The giver is gone. The giver is giving by this instrument, the will. Bryan Garner quotes “the leading American scholars on the law of wills” to “resolve any doubt” about not needing a triplet.²⁵ They state: “‘I give’ will effectively transfer any kind of property, and no fly-specking lawyer can ever fault you for using the wrong verb.”²⁶ I invite anyone to find a published case to the contrary.
- “The most damaging Plain Language rule is to write only words that are commonly used by laypeople in ordinary speaking and writing.” Another straw man. You may extract from some sources a guideline like “Use simple words,” but the explanation that follows will usually make clear that this is not a rigid prescription. A fair reading of the plain-language literature does not support any “rule” to write “only” ordinary words.²⁷
- “Some legal terms have no Plain Language synonyms.” We know. And we have never said otherwise. But we have said—and shown—that (1) terms of art are a small part of most legal documents,²⁸ (2) terms of art should be explained in consumer documents,²⁹ and (3) many terms that lawyers might think of as untranslatable can in fact be replaced with ordinary words.³⁰

- “I would be embarrassed to admit that my job is to write dumbed down statutes.”

Ah, yes, the old dumbing-down argument—another one that should have been buried long ago.³¹ It’s not dumbing down to write clearly for your reader in legal, government, and business documents. It takes great skill, and readers love it. Try to find a reader who protests that a legal document is too clear, that he or she is insulted by the clarity, that the writer should have used a more traditional, legalistic, dense, verbose, contorted style. In fact, no fewer than 25 studies show that readers of all kinds—judges, lawyers, clients, consumers—strongly prefer plain language to the old style, understand it better and faster, are more likely to comply with it, and are much more likely to read it in the first place.³²

There’s no need to go on answering critics. Plain language is changing the landscape—as witness the new Federal Rules of Civil Procedure and Federal Rules of Evidence. And I’d dare to say that in the minds of most writers and drafters, the intellectual debate is over. ■

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ENDNOTES

1. Stark, *Plain Language* <<http://www.ncsl.org/legislative-staff/lssj/june-2012-plain-language.aspx>>. All websites cited in this article were accessed May 16, 2013.
2. See, e.g., Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (Carolina Academic Press, 2012), pp 64–102.
3. See Mellinkoff, *The Language of the Law* (Little, Brown & Co, 1963).
4. 64 Fed. Reg. 41770 (August 2, 1999).
5. *Merriam-Webster’s Collegiate Dictionary* (11th ed).
6. *Id.*
7. See Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 80 Mich B J 52 (August 2009), 46 (September 2009), 54 (October 2009), 50 (November 2009), available at <<http://www.michbar.org/generalinfo/plainenglish/>>.
8. New Zealand Law Comm’n, Report 104, *Presentation of New Zealand Statute Law* (October 2008), pp 14–15, available at <<http://www.lawcom.govt.nz/project/presentation-new-zealand-statute-law>> [giving examples of people who “refer to legislation in their jobs” and other examples of when people may consult it in their personal lives].
9. *Writing for Dollars, Writing to Please*, n 2 *supra* at 31–33; see also Letter from James Conrad Jr., Section Chair, American Bar Association Section of Administrative Law and Regulatory Practice, to US Senators Joseph Lieberman and Susan Collins (December 18, 2012), p 2 & n 4, available at <http://www.americanbar.org/content/dam/aba/administrative/administrative_law/s2337_plain_writing_act.authcheckdam.pdf> (“strongly endor[s] plain language in regulations and expressing “real concern . . . with text that may be understandable, but only to an expert who expends real effort in mastering the text”).
10. See Law Reform Comm’n of Victoria, *Plain English and the Law* (1987), pp 57–58 (“[Explanatory texts] are likely to reach a wider audience than the originals, and to be more widely used than other means of informing the public.”).
11. See Office of Scottish Parliamentary Counsel, *Plain Language and Legislation* (2006), pp 19–28, available at <<http://Scotland.gov.uk/Resource/Doc/93488/0022476.pdf>>.
12. *Writing for Dollars, Writing to Please*, n 2 *supra* at 102.
13. E-mail from Eamonn Moran to the author (October 20, 2012) (on file with author).
14. See Kimble, *Answering the critics of plain language*, 5 *Scribes J Legal Writing* 51, 53–60 (1994–1995).
15. *Writing for Dollars, Writing to Please*, n 2 *supra* at 5.
16. See, e.g., Asprey, *Plain Language for Lawyers* (Federation Press, 4th ed, 2010), p 92 (“We need to be accurate, precise and able to be understood by all our likely readers.”); Eagleson, *Writing in Plain English* (Australian Gov’t Publishing Service, 1990), p 5 (“Writers of plain English documents use language their audience can understand, and ensure that their documents are complete and accurate statements of their topics. They do not leave out important details . . .”); *Writing for Dollars, Writing to Please*, n 2 *supra* at 40 (“Nobody doubts that legal writers need to aim for accuracy and the right measure of precision.”).
17. Dickerson, *Materials on Legal Drafting* (West Publishing Co, 1981), p 265 (quoting one of Dickerson’s earlier articles, now difficult to access).
18. Thornton, *Legislative Drafting* (Butterworths, 4th ed, 1996), p 52.
19. See *Writing for Dollars, Writing to Please*, n 2 *supra* at 22 (citing authorities that list 42, 50, 42, 45, and 25 with lots of subpoints).
20. See, e.g., Felker, *Guidelines for Document Designers* (American Institutes for Research, 1981) (citing empirical research for each guideline); Schriver & Gordon, *Grounding plain language in research*, 64 *Clarity* 33 (November 2010) (describing the current state of research and recommending further efforts).
21. *Writing for Dollars, Writing to Please*, n 2 *supra* at 5.
22. *Id.* at 10.
23. Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* (Harper & Row, 1979), pp 44–50; Redish, *How to Write Regulations and Other Legal Documents in Clear English* (American Institutes for Research, 1991), p 24.
24. See Kimble, *Lessons in drafting from the new Federal Rules of Civil Procedure*, 12 *Scribes J Legal Writing* 25, 34–38 (2008–2009).
25. *Gamer’s Dictionary of Legal Usage* (Oxford U. Press, 3d ed, 2011), p 391.
26. Dukeminier Jr. & Johanson, *Family Wealth Transactions* (Little, Brown & Co, 1972), p 11.
27. See, e.g., Asprey, n 16 *supra* at 232 (providing a side-by-side list of plain and more formal expressions, but noting that the formal one is “perfectly fine in some circumstances”); Kimble, *Plain Words*, in *Lifting the Fog of Legalese: Essays on Plain Language* (Carolina Academic Press, 2006), p 164 (“By all means, use the longer, less familiar word if you think it’s more precise or accurate.”); Wydick, *Plain English for Lawyers* (Carolina Academic Press, 5th ed, 2005), p 58 (“If an unfamiliar word is fresh and fits your need better than any other, use it—but don’t utilize it.”).
28. *Writing for Dollars, Writing to Please*, n 2 *supra* at 36.
29. *Id.*; see also Trudeau, *The public speaks: An empirical study of legal communication*, 14 *Scribes J Legal Writing* 121, 149–150 (2011–2012) (confirming the public’s overwhelming preference that legal terms be explained in an attorney’s communication).
30. See Duckworth & Spyrou, eds, *Law Words* (Centre for Plain Legal Language, 1995), available at <http://www.clarity-international.net/downloads/law_words.pdf> (containing short essays on 28 terms like *joint* and *several* and *right*, *title* and *interest*).
31. *Writing for Dollars, Writing to Please*, n 2 *supra* at 11–14.
32. *Id.* at 134–166.