

Legal Content in Plain Language: An Example

By Candice Burt and Frances Gordon

This month and next month, we will offer examples from South Africa and New Zealand. Questions that might be asked about the example below, from South Africa: Is this so hard? Can't we follow at least some of these practices? It does, of course, take the will to change. —JK

Original clause from employment contract	A possible rewrite
<p>4. Probation (<i>only applicable to new Employees</i>)</p> <p>4.1 Notwithstanding anything to the contrary contained in this agreement, this agreement is subject to the Employee successfully completing a probation period of 3 (three) months commencing on the date of employment.</p> <p>4.2 During the probation period, the Employees performance will be assessed and where appropriate, the Employer will give the Employee such reasonable evaluation, instruction, training, guidance or counseling as may be required to enable the Employee to render a satisfactory service.</p> <p>4.3 On or before expiry of the probation period, the Employees employment may be confirmed; alternatively the Employees employment may be terminated (by the giving of 1 (one) weeks written notice) or the probation period may be extended for such further period as the Employer may determine to be fair and reasonable and after allowing the Employee an opportunity to make representations.</p>	<p>Probation of three months</p> <p>The purpose of the probation period A three-month probation period applies from the start date of your employment. The purpose of the probation is to assess whether you are suitable for the position that we appoint you to.</p> <p>During your probation We base our assessment on how well you perform during the probation period. To help you to perform in a satisfactory way, we'll give you reasonable evaluation, instruction, training, guidance, and counseling.</p> <p>Deciding on your continued employment At the end of the probation period—or before, if we choose—we'll do one of the following:</p> <ul style="list-style-type: none"> – Confirm your employment. – End your employment by giving you one week's notice in writing. – Allow you to present your case to extend the probation period. If we agree, we'll extend the probation for a period that we consider fair and reasonable.

Why the original is not in plain language

Little consideration for the reader

1. The clause does not speak directly to the reader. By addressing the reader as *you*, we bring the reader immediately into the picture and humanize the content.
2. The clause doesn't consider the reader's wants and needs. Unless you're hiring a lawyer, an employee may not know what the legal terminology means.
3. If the probation period applies only to new employees, include it only in contracts for new employees (relevance).

4. Incidental point: South African law allows the employee to terminate during probation too. The original should have said so, and we would recommend including it in a rewrite.

Unnecessary legalese and complex words

5. *Notwithstanding anything to the contrary contained in this agreement* is a throwaway phrase that shows that the writer is not clear about how this provision relates to the others. Here, it's not necessary because it's not introducing a provision that overrides the other provisions. The Labour Relations Act states that employees on probation are still employees and accrue benefits (such as annual leave and sick leave) from the first

day of employment. Therefore, all provisions apply during probation—it's just that the employer won't confirm employment until an employee successfully completes the probation period.

6. *Subject to* is a legalism that can confuse readers. Here, it could be misinterpreted as creating a suspensive condition.
7. There is unnecessary use of complex words: *commencing*, *expiry*, *notwithstanding*, *render*, *terminated*, and *determine*. All can be replaced with plain words.

Unexplained legal terms

8. *Make representations* is a legal term that requires explanation. What does this mean to an employee? Does it mean to make a formal complaint that you did meet your obligations? Does it mean to make a case for an extended probation period?

Confusion of *or* with *and*

9. Complying with legislation doesn't obviate your obligation to write accurately: *evaluation*, *instruction*, *training*, *guidance* or *counseling*. The *or* is confusing. It should be *and*. It wouldn't be enough to argue that you had given the employee one of the items and met your obligations. Also, consider whether *guidance* and *counseling* mean the same thing here.

Long sentences and passive voice

10. Sentence length is excessively long (31, 40, and 61 words a sentence). Plain-language guidelines recommend that you aim for an average of 15 to 20 words a sentence.
11. Using passive voice distances the subject of the sentence (the employer) from the relationship between the two parties: *will be assessed*, *as may be required*, *may be confirmed*, *may be terminated*, *may be extended*.
12. There is wordiness. For example: *by the giving of 1 (one) weeks written notice*.
 - *The giving of* should simply be *giving*.
 - You don't need words and figures for numbers—*1 (one) weeks*. This repetition is needed only on a handwritten check (or other handwritten negotiable instrument), where it's easier to alter numbers (for example, by adding a zero). The argument that having both avoids discrepancies is not logical. There can be no discrepancies if you have only one accurate number. (The rule of interpretation that words prevail over numbers would not even come into play.)

Unhelpful heading

13. The one heading could be more informative. And subheadings would—and do—help greatly.

Poor text layout

14. The design with the justified text is difficult to follow. (In justified text, all words in all lines are spaced out so that the first word aligns with the left margin and the last word with the right margin. This leads to some lines' being compressed and others' being stretched.) Readability research suggests that left alignment with a ragged right edge is easier to read and comprehension is higher. ■



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"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 36 years. To contribute an article, contact Prof. Kimble at WMU-Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/plainlanguage.

(Note: Announcement of contest winners is on the following page)

Contest Winners

The editing contest returned in August and was repeated in September. Readers were no doubt delighted. But we did not have space to announce the winners in November.

As last month's column explained, I'm helping to redraft the Federal Rules of Bankruptcy Procedure. And the contest involves one of those rules. I asked readers to redraft this provision and offered a free book to the first two who sent me an "A" version:

(a) General Right to Amend. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

(A confession: when printed earlier, the first sentence was missing a comma after "petition." Ugh. Although most readers spotted it, I apologize for the mistake. It didn't affect my reviews.)

I offered these suggestions:

- (1) Try to create two subsections with parallel subheadings. Even a short provision can be improved in that way.
- (2) Use the active voice in the one sentence that doesn't.
- (3) Break up the longish last sentence (and you'll gain another kind of parallelism).
- (4) Get rid of *shall*.

And here is the current redraft of that provision (one that could change before the project is completed):

(a) General Right to Amend.

(1) By a Debtor. A debtor may amend a voluntary petition, list, schedule, or statement at any time before the case is closed. The debtor must give notice of the amendment to the trustee and any affected entity.

(2) By a Party in Interest. On motion of a party in interest and after notice and a hearing, the court may order a voluntary petition, list, schedule, or statement to be amended. The clerk must give notice of the amendment to entities that the court designates.

The first winner is Donald Peterson, of George Law in Royal Oak. I don't think the romanettes are needed, and the two parts should be subsections. But good nonetheless.

(a) Amendment by Debtor.

A debtor may amend its voluntary petition, list, schedule, or statement any time before the case is closed. The debtor must give notice of the amendment to (i) the trustee, and (ii) affected entities.

(b) Amendment by Party-in-Interest.

A party-in-interest may file a motion and, after providing notice to affected entities, ask the court to (i) conduct a hearing, and (ii) enter an order amending a voluntary petition, list, schedule, or statement. The clerk must give notice of an amendment to entities that the court designates.

The second winner is Jonathan Fennell, general counsel for Alliance Physical Therapy Partners in Grand Rapids. Again, I would not use romanettes, and I have suggested a few changes in brackets.

(a) General Right to Amend.

(i) By Debtor. A debtor may amend a voluntary petition, list, schedule, or statement [at] any time before the case closes. A [The] debtor must give notice of the amendment to the trustee and any party [entity?] it affects.

(ii) By a Party in Interest. A party in interest may file a motion [move?] to amend a voluntary petition, list, schedule, or statement. The court may, after notice and a hearing, order an amendment. The clerk will [must] give notice of the amendment to entities [that] the court designates.

Congratulations to the winners. Pick from *Seeing Through Legalese: More Essays on Plain Language* or my kids' book, *Mr. Mouthful Learns His Lesson*.