

Plain Language

To speak effectively, plainly, and shortly, it becometh the gravity of the profession.

—Sir Edward Coke, 1600

Plain English in Administrative Law

By Solomon Bienenfeld

I. Panoramic View

The term "administrative law" is somewhat inaccurate, but so deeply imbedded in statutes, appellate decisions, legal texts and legal literature that any attempt to rename it would be futile.

The complex of legal principles which have been assembled under this heading should properly be denoted as "executive law." For, in fact, it deals with the activities of the executive branch of government which, under the separation of powers doctrine, is responsible for the execution of laws. This is in contrast to the legislative branch which is supposed to make laws and the judiciary which is supposed to apply the law to particular cases. The executive branch outnumbers the combined strength of the other branches by a considerable margin and is able to outproduce them in annual tons of written material despite the fact that neither of the others can be classified as paperweights.

It is important to note this at the outset to appreciate the diversity and importance of the mass of written agency material. Basically this material has two functions:

The first is to issue rules, guidelines, interpretive statements, standards, policy statements, declaratory rulings and memoranda which forewarn persons subject to the agency's jurisdiction of how the agency will respond to their conduct. Agency personnel have their own views of the meaning and intent of the law they are enforcing and persons subject to that law who wish to avoid the wrath of the agency must be able to comprehend

this material. That can only happen if it is clearly expressed. The agency also derives benefit from clear communication because this leads to compliance which, in turn, reduces reliance on litigation.

Secondly, agencies conduct hearings that have all of the trappings of a judicial proceeding. These hearings provide an evidentiary basis for applying agency law to individual cases and entail the use of written material as similar to their judicial counterparts as a contested case hearing is to a trial. Contested case documents include notices of hearing, answers, affidavits, discovery documents, orders, proposals for decisions and decisions.

This is the fourth in a series of articles coordinated by the Plain English Committee of the State Bar of Michigan. The articles are written by sections, committees, groups and individuals interested in promoting plain language in the law.

II. Rules

A rule adopted by an agency must be approved promptly by the Legislative Service Bureau to see that it is "proper as to all matters of form, classifications, arrangement, and numbering." Section 45(1) of the Administrative Procedures Act, 1969 PA 306 §45(1); MCL 24.245(1). Section 56 of APA further states that the Legislative Service Bureau shall perform the edito-

rial work for the Michigan Administrative Code so as to achieve internal uniformity as well as consistency with the compiled laws.

While these statutory provisions do not vest the bureau with authority to draft rules, the bureau's approval must be obtained before a rule can be adopted and it therefore exercises considerable stylistic influence. Also, administrators are quite willing to defer to the drafting expertise of the Legal Editing Division of the bureau which employs lawyers who specialize in drafting bills, joint resolutions and administrative rules.

Drafting standards observed by Service Bureau attorneys are fully described in the recent article by Christine M. Kuzara in the Plain English theme issue of the *Michigan Bar Journal*, 62 MBJ November, 1983, No. 11, p. 980, and there is no need to plagiarize them in this article. While it is doubtful that observance of these standards for rule-drafting will result in the consistent creation of literary masterpieces, they do produce statements that clearly inform the initiated of agencies' official position. These standards are consistent with the goals of Plain English and may, in fact, serve as models for achieving clarity, conciseness and consistency for similar kinds of written material.

III. Other Agency Explanations

Although the most important of all agency statements, rules form a small part of an agency's output explaining its programs and policies. To keep their constituency advised, agencies generate written material variously labeled as guidelines, interpretive statements, pol-

icy statements, declaratory rulings, bulletins or memoranda. While (except for declaratory rulings), these policy statements may not enjoy judicial recognition, they do perform a useful purpose. Study of their content may, in fact, serve as a guide through a bureaucratic maze and assist in promoting the good graces of agency personnel. Obviously, clear communication in the language of Plain English is essential.

The pitfall here is not legalese, but bureaucratese. There is a difference. Legalese is a dialect which regularly employs medieval expressions, convolutions and synonyms as a mark of ancient ancestry and distinction. It may be acceptable as a means of communication between members of the elite who are conversant with it but when used in contracts, wills, trust agreements, insurance policies, warranties or memoranda that are directed to lay persons, it becomes a barrier to communication.

Bureaucrats are as attached to bureaucratese as lawyers are to legalese. It is a dialect which distinguishes them from other members of society. The major characteristic of bureaucratese is avoiding precision and never using five words where twenty would do as well. This can be accomplished by relying upon such phrases as "along the lines of" instead of "like;" "during the time that" instead of "while;" "for the reason that" instead of "because," or "notwithstanding the fact that" instead of "although." Using bureaucratese, a civil servant writes:

The particular value of R. Doe's written exposition arises in connection with his extensive discussion relative to the finalization of the processes by which the legislative proposal achieved passage through the Legislature.

instead of

R. Doe's memo was helpful in explaining how the bill was passed.

It will not be easy to wean agencies away from a form of expression which they have taken so long to develop and now hold so dear. But for those who place a higher value on clear communication than on a wish to impress others with erudition, these words of personal observation may be helpful.

The goals of writing agency material are the same as the goals for writing

any good exposition; that is, clarity, precision and succinctness. But, achieving these goals does not require counting the number of syllables in a word or the number of words in a sentence. To write clearly involves selecting the right words and placing them in the right order. The right word with five syllables is preferable to the wrong word with two. It is better to say, "This plan has many ramifications," than to say, "This plan may lead to any number of results which cannot be foreseen." Avoiding use of multisyllable words like "jurisdiction" because it has too many syllables would not clarify a thought; it would confuse it.

Clarity of expression does not require sacrifice of style. Anyone who writes a letter, memorandum or brief wants to be proud of the literary style in which the thoughts are expressed and this can be done using Plain English. In fact, bureaucratese is the absence of style; it is a mold of clichés repeated and rearranged to suit the occasion. Plain English does not mean ugly or dull English; it means clear English. Style should be an ally, not a victim. Use of metaphor, allusion and anecdote enhances clarity and holds the reader's attention.



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IV. Hearings

Having developed only during the past several decades, administrative agencies have an opportunity to shun legalistic forms and expressions during the process of deciding contested cases. Judges and lawyers, having inherited a centuries-old tradition, are understandably loathe to discard it in a fervor of Plain Englishism.

But, in contested case hearings, administrative agencies can use simplified pleading forms instead of formalistic complaints and answers required by court rules. The requirements of section 71(2) of the Administrative Procedures Act, MCL 24.271 can be met by sending a one or two page letter containing a short statement of the charges, a reference to the particular statute and rule involved, a statement of the agency's jurisdiction and the date, time and place of the hearing. If the person charged wishes to answer, this can also be in the form of an explanatory letter written in everyday language.

Written opinions of administrative law judges could benefit by following the suggestions contained in the articles published in the Plain English issue of the *Michigan Bar Journal*, 62 *Mich Bar J*, 1983, Vol. 62, No. 11. Particularly helpful articles are: Felsenfeld, *The Future of Plain English*, p. 942; Hathaway, *An Overview of the Plain English Movement for Lawyers*, p. 945; Alterman, *Plain and Accurate Style in Law-suit Papers*, p. 964; Hathaway, *Plain English in Judicial Opinions*, p. 976; Master, *Plain English for Judges*, p. 978 and Cohn, *Effective Brief Writing: One Judge's Observation*, p. 987.

V. Parting Words

Proficiency in using Plain English in administrative law or anywhere else will not come about by reading this article nor by reading all of the books and articles on the subject. It begins with a sincere, almost religious conviction of its value. Books and articles on the subject will instill and re-enforce this conviction. After that comes the hard part. This means writing, editing and re-editing with Plain English principles in mind. Eventually it will develop into a habit and after the habit is acquired, others will not only be able to understand your message, they enjoy receiving it. ■