
Plain Language

Readability Formulas and Specifications for a "Plain English" Statute — Part 2

by Reed Dickerson

In 1965 Reed Dickerson, Professor of Law at the University of Indiana Law School, wrote the classic *Fundamentals of Legal Drafting*, published by Little Brown and Co., Boston, a book that has become the most referred to of all books on legal drafting. Little Brown and Co. will soon be publishing Professor Dickerson's Second Edition of *Fundamentals of Legal Drafting*. With the permission of the author and the publishers, the *Michigan Bar Journal* and the Plain English Committee are pleased to present excerpts from a chapter in the Second Edition regarding plain English statutes and readability. "Part 1 — History, the Problem and the Case for a Statute" was presented last month. "Part 2 — Readability Formulas and Specifications for a Plain English Statute" is presented this month.

Readability Formulas

Some "plain English" statutes (usually those relating to insurance policies) measure readability by readability formulas, especially that developed by Rudolf Flesch. Ironically, these statutes have provoked attacks on readability formulas generally.¹⁶ Here, we should distinguish between the use of these formulas as general measures of readability, for which they have a fairly good track record, and their use as guides to the specifics of simplification, for which they are almost useless.¹⁷ The difference can be documented by Flesch's own works. Although for reading purposes Flesch relies only on word length and sentence length, for writing purposes he relies also on such factors as use of the active voice, use of the first or second person, and preferment of verb forms over synonymous noun forms.

In a "plain English" statute, no readability formula should be adopted unless it is adequate also as a guide to redrafting, which it probably cannot be.¹⁸ Otherwise, the conscientious redrafter may be lured into a false sense of accomplishment by emphasizing the factors relied on by the readability test to the neglect of the many other factors needed for clarity and readability.

Clarity and readability differ significantly. Robert and Veda Charrow in their study of jury instructions, appear to have concentrated mainly on clarity; Flesch has concentrated on mere readability. A document can meet the Flesch (or Gunning) test 100 percent without rising above gibberish. What is needed here is a general performance standard of decently readable substantive clarity (as adopted by New York's Sullivan law and the laws

of some other states), without mandating a readability formula or a myriad of grammatical detail (as in Connecticut's plain language law and a number of state insurance laws).

Fortunately, clarity and readability are more complementary than competitive. Up to a point we can have both. A preoccupation with clarity alone implies that optimum readability is automatic.

Flesch's preoccupation with readability even to the point of derogating from clarity (and, in some instances, substance) is revealed in his recent attack on a piece of "shredded law," which he unsuccessfully undertook to redraft.¹⁹ Although he might have produced a more adequate result had he done the kind of checking that for the professional draftsman should be routine, his kit lacked many necessary tools.²⁰

During a recent conference on "plain English," one critic of simplification believed that he had exposed a fatuity by citing instances in which "simplification" has produced longer rather than shorter results. But for a person who seeks clarity rather than adherence to a mechanical formula, this is no occasion for embarrassment. The point is especially relevant to the short sentences favored by the readability formulas. Psycholinguists have recently shown that, because the structure of an unavoidably complicated idea is normally hierarchical, it is better grasped if framed in sentences long enough to accommodate appropriate clauses and subclauses than if chopped up into short sentences whose interrelationships are accordingly obscured. "[W]hen we remove relative clauses, we remove the logical connectors that give meaning and coherence to a sentence."²¹ Redish has summarized it well:

The potential harm in writing directly to the formula is that you may not be changing the aspects of the passages that are really causing the difficulty. Moreover, the results may end up sounding like a first grade primer, like what has been called the "Dick and Jane" style of writing. This can be insulting, uninteresting and in fact less understandable than more normal writing.²²

Specifications for a "Plain English" Statute

It would be useful to have a uniform or model language simplification act addressed to "consumer" transactions (appropriately limited and defined), where it is desirable to require language that is clear to a modest level of readership. It should be general, rather than detailed, and it should rely mainly on general performance standards of clarity and readability, bolstered, perhaps, by suggested, otherwise neglected specifics to be taken into account, without requiring semantic precision or forbidding technical language that is generally familiar to the audience or for which no satisfactory "plain English" substitute exists.

The suggested specifics should be limited to matters of format (such as type face, ink-to-paper contrast, paragraphing, and cross-referencing) that are usually ignored or played down in the standard texts on legal writing or legal drafting. Attempts to list the full range of professionally useful devices that improve clarity or readability would be cumbersome, controversial, and inevitably incomplete. And to avoid any undesirable negative implication that might arise from the inclusion of some devices and omission of others, the act should do no more than recite that the draftsman should keep in mind the full range of relevant professionally accepted drafting devices that improve clarity and readability.

It seems undesirable, in such a law, to try to control the drafting of legal instruments other than "consumer" instruments, many of which can accommodate language that would subvert a "plain English" law.

Because many of the enterprises concerned do business in more than one state, a uniform act, if feasible,

would be appropriate. The main argument for a model act is that a "plain English" law should be dovetailed with existing laws dealing with particular kinds of instruments such as insurance policies. This accounts for the main differences between Hawaii's law and New York's. Non-uniformity is guaranteed by any provision that sanitizes all provisions that are required or permitted by existing law, which undoubtedly differ considerably among the states. The problem can be alleviated by amending the related laws.

First of all, language that is merely permitted by other law should not be allowed to preempt an important consumer safeguard. Merely permissive provisions can be repealed or, if needed for other purposes, overridden or supplemented by the more stringent requirements of the "plain English" law.

Preexisting legal rules that mandate specific language should likewise be examined. If the mandate relates to a mere phrase or provision, the legislature may want to preserve it. But this would not necessarily require exempting the rest of the instrument from simplification. The uniform act could simply exempt the mandated provision or require that mandated provisions likely to cause significant trouble for the consumer be supplemented by appropriate definitions, examples, or explanations.

New Jersey's recognition of the validity of "technical terms and terms of art" might be more effective if it provided that under the standards of its act any unfamiliar technical term for which there is no suitable replacement, definition, or explanation may be disregarded for the purposes of the act.

Where an entire form is involved, the chances are great that it is afflicted with many deficiencies that the language simplification acts are intended to discourage. If mandated by statute, the form should be carefully scrutinized and appropriately amended. If mandated by regulation, it should not be exempted from coverage.

In general, requiring specific language in a statute of regulation makes it harder to maintain standards of good draftsmanship. Felsenfeld and Siegel cite this instance:

... A look at one form used for the installment sale of an automobile revealed ten different statutes or regulations. One effect of those particular requirements was to turn what might have been a clear and expository contract into a thicket of legal boiler plate.²³

Even as modest an example as the Federal Trade Commission's requirement that a consumer product warranty state that "This warranty gives you specific legal rights, and you may also have other rights ►



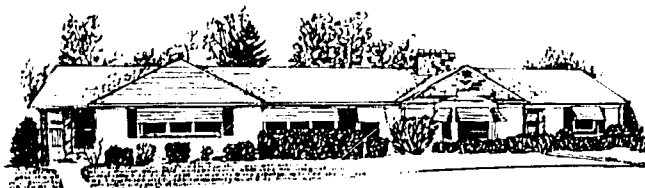
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which vary from state to state"²⁴ creates a dilemma for the draftsman who finds it more appropriate to draft in the third person or to follow the Fowler convention of using "that" instead of "which" when introducing a restrictive clause. It is preferable that the statute or regulation state the substance of the requirement and let the draftsman select the language that best fits the particular instrument. The Federal Trade Commission's door-to-door sales rule provides the needed leeway by requiring the statement concerned "in substantially the following form: . . ."²⁵

It seems appropriate that a "plain English" law fix monetary limits on the transactions covered and on penalties and attorneys' fees. The former help define the kind of consumers who need protection. The latter help avoid penalties so disproportionate that juries would be tempted not to apply them.

New Jersey's exemption of provisions supplied by the consumer makes good sense. A lessor, warrantor, or contractor should not be responsible for the self-inflicted disappointments of a complainant.

As for enforcement, a suit for reformation to reduce the risk of financial loss helps forestall later and more burdensome litigation. Injunctive relief is also helpful. Whether a disposition or contractual arrangement should be voided for bad draftsmanship should be left to general principles of common law regarding unconscionability, bad faith, lack of necessary intent, and so forth. A statement to this effect would head off negative implications that might otherwise arise out of the express remedies.

Full performance is a suitable defense to a suit for damages, because it eliminates the element of injury. It should also be a defense to a suit for reformation, because the need has disappeared. Under conventional doctrine, it would also head off conventional punitive damages. Whether it should make undesirable a separate statutory action for a penalty is debatable.

In view of the chronic ineptitude of lawyers in matters of drafting, the

mere presence of plaintiff's attorney at the time of signing should not disqualify a plaintiff from taking action, as it does in New York. Nor should "good faith" be a defense in any instance, because the predominant cause of bad drafting is ineptitude rather than bad faith. Lawyers need to be more fully motivated to improve their performance in this area.

Other Factors Affecting Readability

A matter stressed by Felsenfeld and Siegel²⁶ is the importance of format and layout. The Document Design Center,²⁷ American Institute for Research, in Washington, D.C., which is mainly concerned with clarity, also concentrates heavily on format. So also the Communications Design Center of Carnegie-Mellon University. Format includes type face and size, margins, blank spaces, line length, space between lines, and other typographical features. Paper color and ink-to-paper contrast also affect readability. These efforts are bearing fruit.

Except where it is prescribed by law, the draftsman has wide control over the format of private legal instruments. He has much less control over the format of statutes and regulations. Except for instruments aimed at the general public, the notion of "plain English" or "plain language" should be abandoned in favor of a concept of readability, appropriate to the audiences respectively addressed, that is deferential to the superior values of substance and clarity and is realizable only through the application of a large miscellany of well-tested rules. Many of these are covered by the readability conventions set forth in the rest of this chapter and in chapter 9.

Despite the skeptics and the necessary reservations, we know that without violating any significant substantive objective we can do a considerable amount of useful simplification to improve clarity and readability. We know it because it has been done, not only in the academic ivory tower, but in the sterner environment of the so-called "real world." ■

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Footnotes

16. E.g., Redish, "Readability, in Drafting Documents in Plain Language" 157 (Practising Law Institute, "Commercial Law and Practice Course Handbook Series No. 203," 1979).
17. Charrow, "What is 'Plain English,' Anyway?," Publication C1 (Document Design Center, American Institutes for Research, 1979), p. 4; DCB 279. As for what the future may hold, see Holland, "Psycholinguistic Alternatives to Readability Formulas" (American Institutes for Research, Wash. D.C. 1981).
18. "The Flesch test cannot differentiate between sentences and nonsentences; between sense and nonsense; between the comprehensible and the incomprehensible." Charrow, "Let the Rewriter Beware 6" (mimeo, available from the author at American Institutes for Research, Wash. D.C., 1978).
19. Flesch, "How to Write Plain English" 10205 (1979).
20. To achieve greater technical "readability," Flesch sacrificed substantive accuracy. He also impaired clarity by introducing ambiguities, elegant variation, lack of structural parallelism, confusing syntax, and a more complicated hierarchy of contingencies. To complete the irony, he adopted the very device he castigated — tabulation — and then, by failing to indent the tabulated material, created a syntactic ambiguity.
But defects in Flesch's redraft in no way lessen the original's possible vulnerability. What, if anything, could be done to improve its readability without impairing accuracy or clarity?
21. Charrow, *supra* note 17.
22. Redish, *supra* note 15, at 127.
23. Felsenfeld & Siegal, "Writing Contracts in Plain English" 50 (1981).
24. 16 CFR 701(3)(a).
25. 16 CFR 429(a), 17 F.R. 22934.
26. Felsenfeld & Siegal, "Writing Contracts in Plain English," ch. 8 (1981).
27. Under the capable direction of Janice C. Redish, who is also co-author of several excellent manuals. E.g., Felker (and others), "Guidelines for Document Designers" (American Institutes for Research, Wash. D.C., 1981).