

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

— Sir Edward Coke, 1600

Plain English Statutes and Readability

By Reed Dickerson

Part I — History, the Problem and the Case for a Statute

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.

A Bit of History¹

Although it is hard to say when the complaints against legal language began, outrage is hardly new. Legal prolixity came under fire as early as 1566.² Thomas Jefferson took up the cudgel in 1778.³ Jeremy Bentham fumed about legislative long-windedness early in the 19th century.⁴ Fred Rodell, writing in 1939, said, "Almost all legal sentences . . . have a way of reading as though they had been translated from the German by someone with a rather meager knowledge of English."⁵

The modern push for clear readable legal instruments began in the early 1940's following Congressman Maury Maverick's coinage of "gobbledygook" and the Office of Price Administration's first attempts to impose price controls at the beginning of World War II. Finding that America's small businessmen could not understand its regulations without

the intervention of lawyers, OPA engaged Professor David F. Cavers of the Harvard Law School and Rudolf Flesch to help the agency communicate more effectively with the people whose prices it regulated.

From OPA's experience came a body of expertise useful in simplifying regulations and statutes.⁶ This was improved during the Pentagon's ten-year post-World War II recodification of the Nation's military laws⁷ and later during the Federal Aviation Agency's recodification, in the early 1960's, of the vast accumulation of regulations relating to aircraft. Indeed, this expertise, since refined and extended to private legal instruments remains useful, even today.

Despite these developments, the public visibility of the movement to simplify faded with the war pressures that supported price control. The resulting public passivity went undisturbed, even by the Korean and Vietnamese wars, until the explosion of the consumer movement, which in the early 1970's turned its attention to instruments that the typical consumers of goods and services are being persuaded to accept: insurance policies, product warranties, and credit documents. At the same time, many small, relatively unsophisticated businessmen were being subjected to a barrage of detailed regulations from agencies such as the Occupational

Safety and Health Administration and the Environmental Protection Agency. As a result, public pressure to simplify legal instruments became even greater than it was during World War II.

Mandating Plain English: First Efforts

The most dramatic development in the drive to simplify the language of private legal instruments came with the emergence of the "plain English" movement. The first glimmerings came in 1974, when Nationwide Mutual Insurance Co. and Sentry Life Insurance Co. introduced simplified automobile insurance policies, and in 1975, when Citibank and First National Bank of Boston introduced simplified consumer loan arrangements.⁸ The first week in February, 1977 saw the introduction of the Sullivan Bill in New York, which became law the following year,⁹ and President Carter's television "fireside chat" (replete with rocking chair and cardigan sweater), which culminated in an executive order that required plain English in government regulations.

The first efforts to legislate "plain language" show widely differing approaches. New York's Sullivan law, brain child of a Citicorp lawyer, Duncan A. MacDonald, protects "consumer" instruments, which are defined as residen-

This is the tenth in a series of articles coordinated by the Plain English Committee of the State Bar of Michigan. The articles are written by groups and individuals interested in promoting plain language in the law. Anyone interested in submitting an article for publication should contact Mr. George H. Hathaway, Chairperson, Plain English Committee, Detroit Edison Co., 2000 Second Ave., 688 WCB, Detroit, MI 48226.

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tial leases or contracts for money, property, or services for "personal, family, or household purposes" and involve \$50,000 or less. The mandated standard is "plain language," defined as language "written in a clear and coherent manner using words with common and everyday meanings," and "[a]ppropriately divided and captioned." In case of non-compliance, the consumer is entitled to actual damages and a civil penalty of \$50, but not attorneys' fees or court costs. Defenses include good faith and full performance. The Attorney General may bring an action for an injunction or restitution. Other states have followed suit.

The Federal government has set a few, very general standards of clarity and readability. Under the Consumer Product Warranty Act, for example, the Federal Trade Commission has, by regulation, required that written consumer product warranties set forth specified items of information "in simple and readily understood language." The Truth in Lending Act and its supplementary Regulation Z require that the disclosures required by that Act be made "clearly and conspicuously." Neither of these examples has much to offer in the

present context. A more useful guideline appears in the Employee Retirement Income Security Program: "The summary plan shall be written in a manner calculated to be understood by the average plan participant."

Stating the Problem

What is the best way to solve the problem? First, we have to understand it. This involves, among other things, knowing how lawyers got into this mess. The traditional explanation has been that every discipline needs its own technical terms, some of which may be meaningless to outsiders. It is also true that many legal terms have perfectly adequate "plain English" equivalents and some matters need not be as complicated as they at first seem. Here, a good case for simplification can be made.

Unfortunately, drafting tradition retains the heavy flavor of now-extinct conditions that prevailed for a long period beginning in 1487, when drafting by the judiciary ended.

Legislative gobbledygook apparently reached its peak in the eighteenth century, a peak so high that even the massive statutory reforms that Bentham generated early in the nineteenth century have not succeeded in leveling it.

As a consequence, lawyers have long been enmeshed in an accumulation of outworn forms that they have been reluctant to revise if the forms have been adjudicated in court, and unable to revise if they do not understand them, which is often the case. A thorough purging of offending forms would be a happy event.

But do we need a law?

The Case for a Statute

The idea of legislating the specifics of good writing is, for professional draftsmen, highly repugnant and not merely because most of the people who have been writing these laws have failed to get an adequate handle on the principles of clear communication. It is desirable not to tie the hands of draftsmen who need elbow room.

A normal first reaction to the Sullivan law was that, while a minor political miracle, it was naive, inadequately framed, and unenforceable. Many members of the Bar still think so. But they may be missing the main point. Despite its weaknesses, it dramatically sym-

bolizes the current public distaste for ineptly crafted laws, regulations, and consumer instruments, and the failure of the legal profession to keep abreast of modern planning needs. Although the Bar is beginning to wake up (along with some law schools), the pace has until recently been glacial.

The main value of the plain English laws appears to be symbolic. Although New York's Sullivan law is probably (in any serious sense) unenforceable because of its "good faith" defense (most bad draftsmen operate in good faith), the results that it seems to have helped to produce in that state are impressive. Decently readable insurance policies and warranties are now common.

To accelerate this trend, the organized bar (and indirectly the law schools) needs a similar legislative jolt in other states, which can be delivered without seriously compromising the principles of good draftsmanship. Because a highly developed expertise for simplifying legal instruments already exists, it is time that it be put to more effective use.

And so, a modest case can be made for a law to help the legal profession overcome its present, partly justifiable inertia. Without it, the organized bar is unlikely to initiate effective action to improve the clarity and readability of legal instruments.

Some Reservations

One problem is that the "plain English" ideal, if not carefully focused, can be seriously off the mark. "Plain English" is in many legal contexts anything but plain. Besides, the concept suggests that there is an ideal way to say things that will fit all legal audiences.

Because legal audiences differ widely, the draftsman should be permitted to adjust his focus accordingly. On the other hand, no great harm is involved if such a law focuses solely on professionals who deal with unsophisticated consumers, where mandating a higher level of understandability makes some sense. It makes less sense if the effort is spread over a wider base within which audiences differ materially.

Judge Harold Leventhal's observation that simplifying private instruments would make it harder to charge what they are worth¹⁰ is relevant but not persuasive. His explanation too readily becomes an excuse for the status quo,

which is deplorable. The answer is that in most cases the matter can be handled by educating the client, preferably in advance, about what is involved. This will head off most of the unpleasant surprises.

Terms of Art

Another basis for skepticism has been the generally acknowledged necessity of honoring legal "terms of art." This is a problem for a legal term only if there is no usable replacement.

What is a legal "term of art?" Mellinkoff says that it is a "technical word with a specific meaning."¹¹ A technical meaning, of course, is likely to be unfamiliar to the general public. But the determining factor, he says, is "specificity," which he equates with "precision."

But if unique aptness is not the determining factor, where is the problem? If Mellinkoff is right, the concept of "term of art" is here irrelevant. Semantic precision is not the ultimate, or even main goal in drafting, and its presence does not guarantee suitability. The appropriate measure of aptness is, rather, the draftsman's substantive mission, for which generality and even vagueness are often preferable. The Sherman Act is the classic example.

Mellinkoff's definition of "term of art" may look like a paraphrase of the definition in *Webster's Third International Dictionary* ("a word or phrase having a specific signification in a particular . . . department of knowledge"), but it is not. Because "specific" is closer to "special" than to "precision" and "signification" refers, not to the concept, but to the relation between it and its technical name, the gist of "term of art" would seem to be its uniqueness for practical use.

Ironically, Mellinkoff supports this view of semantic precision by many of his own examples. "Laches," "comparative negligence," "merchantable," "tort," and "stare decisis," which he lists as legitimate "terms of art," are all highly general and highly vague.¹² Precision is not the problem. The problem is irreplaceability: To what extent is the draftsman stuck with technical legal terms that are unfamiliar to the general public? Mellinkoff associates terms of art with irreplaceability in his questionable contention that the greater its precision ("sharpness") the greater the chance that a term "has no synonym in ordinary English."¹³ Many of his non-specific terms of art likewise have no equivalent

in plain English. The importance of irreplaceability is hard to avoid.

What we are really concerned with in legal drafting is otherwise apt, but generally unfamiliar, language for which no familiar language is a suitable substitute. This may mean suitable in law or suitable in fact. As an example of the former, the law might permit only one way of expressing an idea. A classic example is D'Arundel's case,¹⁴ which held that if a person wanted to convey land in fee simple, he had to say "to A and his heirs." No substitute, no matter how clearly synonymous, would do.

A modern counterpart is Section 3-104(1)(d) of the Uniform Commercial Code, which provides that to be negotiable, a note must "be payable to order or to bearer." This means that it must say "order" or "bearer." Although modern law contains little of this kind of mandated legal suitability, the draftsman must remain alert to the danger.

What about factual suitability? Here, we are talking about a term that refers to a body of law and for which there is no useable substitute with equivalent legal connotations. Examples are "surrender" (of a lease), "merchantable," "unconscionable," and "venue." Until a suitable synonym appears, there is no practicable alternative to using the accepted term or perhaps creating equivalence by express definition. Example: "In this policy, the term 'legal cause' means proximate cause." Here, it is safe to use "legal cause" throughout the rest of the instrument without losing the benefit of the established legal connotations of "proximate cause." Unfortunately, in this instance, the definition would not be very helpful. In many cases, the only other acceptable alternative is a supplementary explanation or referral to a lawyer.

In any event, the outer limits of "term of art" need not concern us. Indeed, it is unnecessary even to refer to the concept. The important thing is that the instances in which the draftsman has no legal or practicable choice as to how something may be effectively stated are few enough to leave him considerable opportunity to simplify or otherwise improve the language of legal documents. As for the unavoidable terms, he always has the option of adding explanatory material if he believes that it would be helpful and not unduly cumbersome. Experience with the Securities Act of 1933 and the recent Truth in Lending

Act shows that the danger of "information overload" is a real one.

In any event, technical terms are not the main source of trouble. As Janice Redish has pointed out, "The complexity of the sentence structure is a much greater barrier to understanding . . . than the technical vocabulary."¹⁵ ■

Footnotes

1. In these first few sections, I have drawn heavily from my paper, *Should Plain English Be Legislated?*, in *Plain English In A Complex Society* (The Poynter Society, Indiana Univ. 1980), at 18.
2. Milward V. Welden, 21 Eng. Rep. 138 (Ch. 1560). See also Chancery Ordinance 55, 15 *The Works of Francis Bacon* 362 (Spedding, Ellis, and Heath eds. 1864); Edward Coke, 2 Coke Rep. xii-xiii (new ed. 1826).
3. 2 *The Papers of Thomas Jefferson* 230 (Boyd ed. 1950).
4. 3 *The Works of Jeremy Bentham* 239-53 (Bowring ed. 1838-43)
5. Rodell, *Woe Unto You, Lawyers!* 185 (1939).
6. E.g., see Dickerson, *FPR No. 1: An Experiment in Standardized and Prefabricated Law*, 13 U. of Chi. L. Rev. 90 (1945); Conard, *New Ways to Write Laws*, 56 Yale L.J. 458 (1947); Cavers, *The Simplification of Government Regulations*, 8 Fed. B.J. 339 (1949).
7. See *A Manual for Drafting Federal Legislation*, 11 Fed. B.J. 238 (1951) (authorized suppressed), later expanded into *Dickerson, Legislative Drafting* (1954).
8. Hathaway, *An Overview of the Plain English Movement for Lawyers*, 62 Mich. B.J., 945, 946 (1983).
9. N.Y. Gen. Oblig. Law 5-702.
10. Dickerson (ed.), *Professionalizing Legislative Drafting — The Federal Experience* 27 (1973).
11. Mellinkoff, *The Language of the Law* 16 (1963); *Legal Writing—Sense and Nonsense*, 7 (1981).
12. Mellinkoff, *The Language of the Law* 17 (1963); *Legal Writing: Sense and Nonsense*, 203, 228 (1981).
13. Mellinkoff, *Legal Writing: Sense and Nonsense* 108 (1981).
14. D'Arundel's Case, *Bracton's Notebook Case No. 1054* (1225).
15. Redish, *Drafting Simplified Legal Documents: Basic Principles and Their Application, in Drafting Documents in Plain Language* 121, 126 (Practising Law Institute, Commercial Law and Practice Course Handbook Series No. 203, 1979).

Reed Dickerson is a Professor of Law at the University of Indiana Law School. His books include *Legislative Drafting, The Fundamentals of Legal Drafting, The Interpretation and Application of Statutes and Materials on Legal Drafting.*