

A Global Perspective

By David Elliott

Long words bother me
—Winnie the Pooh

The Thread

A thread which links us all is language—the language we use to communicate with each other.

This article is about the language we use in written communication in business, government, and the law; why we should communicate in plain language and ask others to use it as well; and what is happening around the world to encourage the use of plain language.

What is Plain Language?

Plain language is language that is clear, direct, and straightforward. It is language which allows readers to concentrate on the message conveyed, not on the difficulty of the language used.¹

Plain language uses the right word for the right occasion and does not use unnecessary words.²

Communicating in plain language includes careful text presentation. Good text presentation incorporates the latest techniques to help understanding and avoids things that hinder comprehension. The result is a text that is well organized with typestyle, layout, page color, line length, and indentations all designed to communicate the message in the clearest possible way.

The Reasons for Using Plain Language

There are many, but three basic ones.

1. Understanding

If we write something for others, it is fundamental that our readers should

understand it. If they do not understand it, both readers and writer have wasted their time.

This is so obvious that it hardly needs to be said, yet our society has reached the stage where most people expect that they will *not* be able to understand official communication.

What an incredible situation! We are discovering new information about the creation of the universe,³ yet in daily written business, government, and legal communication we do not expect to be able to understand each other.

The use of plain language can change all that.

2. Plain Language Saves Time and Money

If consumers can understand a document on a first or second reading, it saves their time. There are fewer questions for staff to answer; so staff time is saved. Staff will understand the document more easily, and training time for them is cut down. Application forms, if drafted plainly, will be correctly filled in the first time. This saves time for checkers, and in not having to return forms for corrections, with the subsequent further checking that is required.

Today, respect for anything comes first from understanding. The law in particular can no longer survive on mysticism, archaic language, and mumbo jumbo.

As Lord Diplock said in an English case⁴

absence of clarity [in legislation] is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it.

Certainly the law can stumble along for another few decades as it has for the past few centuries, but the real danger is that when the legal profession as a whole *does* wake up it will find it is too late, that the law and lawyers have become irrelevant.

A recent study⁵ shows that jury instructions cannot be understood by most jurors. Absence of clarity means that justice is impeded. Why is it that so fundamental a part of our justice system is flawed? Who can say what effect those badly written instructions have had?—but they reflect no credit and create more disrespect for our legal system.

We all spend a lot of time reading what other people write. Official writing is full of dead material clogging up the thoughts of its readers. Most of it could be reduced by 10 to 50 percent just by getting rid of unnecessary words. Think of the saving of time, for both reader and writer, and that's without applying other techniques for writing clearly.

The use of plain language creates an efficient, effective, and economical working environment.

These are not the rabid ramblings of a born-again plain language proponent. They have been demonstrated and

"Plain Language" is a regular feature of the **Michigan Bar Journal**, edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

proved in the United States, the United Kingdom, Canada, and Australia.

3. Respect for the Law

Our society is built on democratically elected assemblies who make law for us. You and I make our own law every day as we buy groceries, gas, or a meal, take out a bank loan, buy a car or house. Large or small, each of these activities creates law—a legal agreement.

When the agreement is oral, the language is usually understandable. When the agreement is written, it inevitably becomes mangled by legal gobbledegook. The problem becomes that much more difficult when we are faced with standard forms of contract which supply essential goods or services, but are obviously not written with the reader in mind and are difficult or impossible to change.

How is it that once we write down our agreements, the words become mangled? The answer is, because of the combined effects of history, ignorance, and indifference.⁶

We can expect no respect for the law or those who administer it if the law is not written in an understandable way.

That is the state of things today. Here is what has happened and is happening on the international scene.

Plain Language Developments

To provide a flavour and to show that the movement is international, I will briefly trace the history of English as the language of the law and some recent developments in the plain language movement.

English as the Language of the Law

The language of the law at the time of the Battle of Hastings in 1066 was English and Latin, with Latin predominant and the English of those days barely recognizable to us today. During the next 400 years, Latin and later French were the predominant legal languages.

After 1487 English became the language of legislation, but the language of the common law of England remained Latin and French for several centuries.

There were three attempts to change the language of the law by statute. The first was the Statute of Pleading in 1362.⁷ It decried the use of French (although it was written in French). It required the language of the courts to be English (but documents to be recorded in Latin).

The second attempt was a statute promoted by Cromwell's Parliament, in 1650, "for turning the Books of the law... into English".⁸ It was principally aimed at court proceedings, but it included a requirement that "statutes... shall be in the English tongue". It was not happily accepted by the legal profession and in 1660, after the Restoration, was repealed.

The third attempt to change the language of the law to English was legislation passed in 1731 requiring that all court proceedings and statutes

shall be in the English tongue and language only, and not in Latin or French... and [court proceedings] shall be written in such a common and legible hand and character, as the acts of parliament are usually engrossed in...⁹

All three statutes were aimed at making the law more understandable and accessible to the public. In one sense those early statutes can be seen as the forerunners of the more recent "Plain English" statutes in the United States.

International Trends

Throughout the world, attempts are being made to make business, government, and legal communication more

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accessible and understandable to those who must read them.

The label "plain language" is a convenient one to provide a focus to concerns about improving official writing. In this century there has been a slowly increasing concern about the language of the law and the language used in business and government documents.

One early Parliamentary Counsel in the United Kingdom (the lawyers in the UK who draft legislation) was concerned that "layfolk" be kept in mind when drafting legislation.¹⁰ In the United States Professor David Mellinkoff wrote a classic, *The Language of the Law*, in 1963 which dispelled many myths about legal language. In the United Kingdom a plain English campaign within Government lead by former Prime Minister Margaret Thatcher has revolutionized government forms and government communication. It is a continuing program. In Australia the work of the Victorian Law Reform Commission on Plain English has dominated the latter part of the 1980s. The First Parliamentary Counsel in Australia is changing the legislative drafting style in Australia by using clear writing principles.

The plain language movement emerged in the mid-1970s. It is said to have developed in response to the needs of consumers for documents they could understand and the recognition by government and business that plain language brings efficiency and economic benefits.

During the past two decades research has uncovered obstacles to understanding the written word. That research has contributed to a multi-disciplinary interest in the way in which texts can best be written and designed to make them easier to understand.

United States

In the United States plain English insurance policies appeared in the 1970s in response to consumer demands for comprehensible documents.

In 1978 President Carter ordered that regulations be as simple and clear as possible

and in 1979 that

[government forms] should be as short as possible and should elicit information in a simple and straightforward fashion.

Various state and municipal governments have embarked on legislative rewriting programs based on plain language principles. Approximately 35 states have laws requiring that certain insurance policies meet "readability" tests. About 8 states have passed laws requiring that residential leases and some consumer documents be written in a clear and coherent manner.

The legislative activity in the United States has stimulated law schools to create legal writing programs as a component of law degrees. It has also stimulated some law firms to hire experts in language to help them redraft their legal forms.

In 1981 the State Bar of Michigan formed a Plain English Committee to promote clear writing in contracts and other legal documents. Since 1984 the committee has prepared a monthly Plain Language column in the *Michigan Bar Journal*. More recently the State Bar of Texas also created a Plain Language Committee. And in July 1989 the Board of Governors of the State Bar of California adopted a resolution that not only calls for lawyers to simplify forms and documents, but also commits the bar to developing guidelines to follow in the battle against legalese.

A number of other organizations promote plain language. A leader is the Document Design Center, American Institutes for Research, which researches and tests many facets of writing.¹¹ The Scribes Journal of Legal Writing, first published in 1990, seeks to promote better legal writing within the legal community. It is the latest attempt to bring together as writers and readers all who have a professional interest in improving legal writing.¹²

European Community

A campaign for plain language in official communication was launched last year in the European Community. The campaign is backed by members of the European Parliament, two of whom have submitted a motion in the European Parliament calling for plain language in European documents.¹³

At the first annual "Eurospeak Awards" examples of incomprehensible documents were given. This was one prizewinner, from the Official Journal, reporting a decision of the European Court:

Article 30 of the Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind.

United Kingdom

An organization called the "Plain English Campaign", started in 1979, raised public consciousness. The Campaign has worked with government agencies to improve forms, government documents, consumer contracts, and business forms. It has had a major impact and is a continuing campaign.

In 1982 a White Paper "Administrative Forms in Government" (Comnd. 8504) led to the appointment of an office attached to the British Cabinet Office to coordinate and plan the revision or elimination of Government forms.

Former Prime Minister Margaret Thatcher took a personal interest in the program, which requires Government Departments to report on their activities each year and to plan for the next year. Hundreds of forms have been eliminated or improved. Cost saving for the Treasury is in the millions of pounds.

In February 1988 Prime Minister Thatcher wrote:

Human relationships depend on communication. Bad writing is a barrier to

communication. When a large organization such as the Government tries to communicate with the man and woman in the street the scope for misunderstanding is enormous. Too often clarity and simplicity are overwhelmed by pompous words, long sentences and endless paragraphs.

If we all wrote in plain English how much easier—and efficient—life would be.¹⁴

"Clarity", a movement in England to simplify legal English, continues to promote plain language principles and has been instrumental in having various drafting courses supported and recognized by the English Law Society.¹⁵ It is involved in a number of document rewriting programs, including national standard conditions for the sale of land. The UK National Consumers Council has also done valuable work in promoting plain language in consumer contracts and raising public awareness. It recently published a paper calling for legislation to require plain language in consumer documents based on the US model.

Australia

The insurance industry produced plain English policies in 1976. Banks and other commercial institutions have followed but, at least until recently, progress is said to have been piecemeal.

The Australian Government adopted a plain language policy for official documents, and a branch of the Government has been set up to develop the program and conduct workshops. It also trains people to prepare plain English documents.

The Law Reform Commission of Victoria, under the chairmanship of David St. L. Kelly, made a significant impact on the legal profession and governments with its Report on Plain English and the Law (1987).

The First Parliamentary Counsel of Australia, Ian Turnball, has officially adopted a "clear drafting" policy. But Mr. Turnball has done more than declare an intention—he has turned his office into what is perhaps the most

innovative legislative drafting office in the Commonwealth.

Robert Eagleson, a Professor of English, continues to probe and challenge the legal profession, in Australia and overseas, with his advice and writing. He has advised governments, insurance companies, banks, law firms, and legislative counsel offices about how to write documents more clearly.¹⁶

Outside the strictly legal arena, the Communication Research Institute of Australia Incorporated provides valuable advice on all aspects of plain language.¹⁷

In January 1991 the Centre for Plain Legal Language opened its doors. It is a joint project of the Faculties of Law and English at the University of Sydney.¹⁸

New Zealand

The Public Trust Office leads New Zealand with its plain language forms. But elsewhere progress seems slow despite support by former Prime Minister Geoffrey Palmer.

The New Zealand Law Commission has, as one of its functions, to "advise on the ways in which the law can be made as understandable and accessible as is practicable". Within some of its reports the Law Commission has made

suggestions for improving the form and style of New Zealand legislation.¹⁹ The Commission has also sponsored visits by Robert Eagleson to talk to and work with groups in New Zealand interested in pursuing plain language.

The New Zealand Consumer Affairs Ministry has drafted some plain language contracts which it hopes business will use. To date, business has been reluctant to do so, partly because it was not sufficiently involved in their preparation.

Canada

Canada was slow to take up plain language. But it is making up for lost time now.

The Law Reform Commission of Canada has done valuable but limited work with Federal Government Department forms.

The Canadian Bar Association has started to promote the use of plain language throughout the legal profession

David Elliott practices law in Alberta, Canada. His practice is limited to drafting legislation and acting as an arbitrator. He is a leading advocate in the use of plain language in all forms of legal, business, and official communication.

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in Canada. The latest impetus for the legal profession is a report by a joint committee appointed by the Canadian Bar Association and Canadian Bankers' Association on plain language documentation.²⁰ The report calls for improved legal education and seeks a commitment to plain language from the legal profession and the banking industry. The report will be considered by both the Bar and Bankers' Associations in 1991 with a view to implementing the recommendations.

In Alberta the Law Reform Institute has committed itself to writing reports in plain language and hires an editor to help with the task. The Institute has also recently obtained funds to take on specific rewriting projects (for example, a standard form power of attorney).

The Alberta Government has recently released a proposal for a plain language initiative to improve consumer contracts.²¹ The Alberta Consumer and Corporate Affairs Department is planning a larger scale campaign enlisting the support of business and consumer organizations, and also chairs an inter-provincial committee on the same topic.

Quebec introduced a plain language tax form in 1982, and Ontario has some limited plain language activity.²²

British Columbia, as part of a large-scale reform of the courts system, is designing a strategy to implement plain language as part of the justice system. This involves a new Plain Language Institute. As a separate project, the Continuing Legal Education Society of British Columbia has a plain language drafting project.

One of the first major Canadian developments was the establishment of a Plain Language Centre by the Canadian Law Information Centre (CLIC). CLIC includes representatives of government agencies and the legal profession. It has designed a major project to help Canadians learn about plain language principles, and it provides the training and research to implement them.²³ CLIC has also assisted in drafting projects.²⁴ In January 1991 CLIC sponsored the first gathering of Cana-

dian organizations promoting plain language, with a view to developing a national strategy.

Some Canadian banks and insurance companies use plain language forms and policies, but at present there is no clear commitment to plain language, although there are encouraging signs.

Conclusion

The language of business, government, and law in the 1990s and beyond will become plain language. Once we accept in principle that plain language is our goal, then we will find many ways to write plainly.

We must challenge our habits, our assumptions, business, government, and the law. We must seek advice from experts in communication and draw from them those things which can help us all communicate more clearly. Plain language must become a part of the fabric of business, government, and legal communication.

And as individuals, what can we do? I suggest:

- Challenge the gobbledegook. There is no reason today for documents to use archaic words like "said", "hereinbefore", "aforesaid";
- Ask for documents in plain language;
- Expect to understand the documents you are asked to sign. If you don't, either correct them yourself or ask that they be rewritten so they are understandable;
- Support lawyers and businesses who do business in plain language; avoid those who do not.

And when *you* write, write with *the reader* in mind. ■

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For a comprehensive list of resources about plain language, write to The Plain Language Centre, Canadian Law Information Council, 600 Eglinton Avenue East, Suite 205, Toronto, M4P 1P3.

Footnotes

1. Of all the explanations of what plain language is, I like this the best—taken from an explanation by Professor Robert Eagleson of Sydney, Australia, during seminars he gave in New Zealand in 1988.
2. We can help Winnie the Pooh by using short words if they can properly replace long ones. If they are not adequate replacements, other techniques (like using examples) can be used to help comprehension.
3. From the Hubble Space Telescope, launched on 25 April 1990.
4. *Merkur Island Shipping v Laughton* (1983) 2 AC 570.
5. Steele and Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 North Carolina Law Review 77 (1988).
6. On the whole I don't think standard forms are written so as to intentionally hide the real agreement or limitations on liability—although that may be a significant side "benefit" to the writer.
7. 36 Edw. III, Stat. I, c.15. For an 18th century translation see Mellinkoff, *The Language of the Law* (Little, Brown and Company), pp 111-112.
8. Mellinkoff, *The Language of the Law* (Little, Brown and Company), pp 126-127.
9. 4 Geo. II, c.26.
10. Sir Courtney Ilbert, in 1901. A far cry from the view expressed by the First Parliamentary Draftsman for Scotland, who said in 1986

It is too often suggested... that the intelligibility of a statute to the general public is a prime consideration in drafting it. I do not believe that this is so.

I am firmly of the opinion that however we draft our statutes, the British public, except perhaps for the remote lunatic fringe, never read the statutes nor are likely to.

(*British and French Statutory Drafting—The proceedings of the Franco-British Conference of 7 and 8 April 1986 (Institute of Advanced Legal Studies—University of London)*, p 63.)

In 1987 Professor David Kelly, Chairman of the Victorian Law Reform Commission, Australia, put forward this view:

[T]he primary audience [for the drafter] is not the judiciary. The judges are breakdown experts. One should not design a law, any more a car, primarily for breakdown experts. One should design it to do its essential work, bearing in mind, of course, that breakdowns may occur. If the draftsman pays attention to that principle, he will use, as far as possible, the language understood by the practitioners in the relevant field.

(Companies and Securities Workshop, August 1987—A paper on Plain English drafting initiatives in relation to takeovers, pp 22-23.)

11. Document Design Center, American Institutes for Research, Washington, D.C.
12. The editor is Bryan A. Garner, Visiting Associate Professor of Law, University of Texas. For subscription information: Scribes, School of Law, Box 7206, Wake Forest University, Winston-Salem, N.C. 27109.
13. There are nine European community languages.
14. Introduction to a booklet called *Making it Plain*, published by the Cabinet Office, Office of the Minister for the Civil Service.
15. For information: Mark Adler, 35 Bridge Street, East Molesey, Surrey, England, KT8 9ER.
16. Robert Eagleson's latest publication is *Writing in Plain English*, Australian Government Publishing Service, Canberra, Australia (1990).
17. For information: GPO Box 655, Canberra ACT 2601, Australia.
18. Centre for Plain Legal Language, University of Sydney, Faculty of Law, 6th Floor, 173-175 Phillip Street, Sydney, NSW 2000, Australia.
19. New Zealand Law Commission Report 6, paragraphs 434-442.
20. The Decline and Fall of Gobbledygook: Report on Plain Language Documentation.
21. Discussion Paper: Plain Language Consumer Contracts: A benefit for consumers and business alike (1991). Consumer and Corporate Affairs, Edmonton, Alberta.
22. Ontario's vehicle registration and driver's licence forms have been drafted in plain language.
23. For information: 600 Eglinton Avenue East, Suite 205, Toronto, Ontario M4P 1P3 Canada.
24. One example was a lease prepared as a demonstration project with Toronto's municipal housing authority, Cityhome.

An Update:

In February 1991, the Canadian Bar Association passed a resolution based on the report of the joint committee appointed by the Canadian Bar Association and the Canadian Banking Association (mentioned above under "Canada"). Now if only the American Bar Association and the state bar associations would do the same...

Resolution M-08-91

Plain Language Documentation

BE IT RESOLVED THAT The Canadian Bar Association adopt the following recommendations, contained in the *Report of the Joint Committee on Plain Language Documentation*:

The Plain Language Process

1. Plain language drafting should be viewed as a dynamic process rather than simply the mechanical application of static rules. Plain language drafting is an activity that requires skill. But this skill can be acquired through appropriate study and training.

The Legal Profession

2. Canadian law schools and Bar Admission courses should be urged to include a plain language drafting course in their curriculum in an effort to instruct law students on how to write better, more plainly, and more clearly.

3. Law Societies and bar associations should design and offer Continuing Legal Education courses on writing in plain language.

The Banks

4. Canadian Banks and other large organizations should require that their lawyers draft documents in plain language style.

5. Each large organization should develop a plain language policy in the writing of its forms and documents that are intended for consumer use.

6. The organization should appoint a small interdisciplinary committee to develop consumer forms. The first draft of any consumer form in an organization should be done by a person with plain language drafting training and experience.

7. Banks and other large organizations should ensure that all employees have access to writing skills courses that stress plain writing techniques, and should encourage their employees to take these courses.

Governments

8. The Joint Committee urges all governments in Canada to adopt plain language techniques in the drafting of legislation, regulations, and government forms, and in so doing, to set an example for commercial practice.

The Plain Language Coalition

9. Both CBA's should adopt a Joint Statement of Principles stressing the need for plain language documentation, undertaking to promote plain language documentation within their memberships and throughout the Canadian community, and inviting other segments of the business, legal community, and government to adhere to the Joint Statement of Principle.

10. Industry associations, law firms, and government departments that adhere to the Joint Statement of Principles would, in so doing, become members of "The Canadian Coalition For Plain Legal Language"/"La coalition canadienne pour la lisibilité juridique".

A list of the members of this coalition should be published from time to time by the Canadian Legal Information Centre.

11. With the assistance of the Canadian Legal Information Centre, the Coalition should advocate the increased use of plain language drafting in Canada and serve as a resource to its members in the drafting of plain language documentation.

CARRIED