

An Excerpt from the Indispensable Book: Garner's Dictionary of Modern Legal Usage

Oxford University Press has just published the second edition of Bryan Garner's *Dictionary of Modern Legal Usage* ("DMLU"). Garner has been called "America's foremost authority on language and the law," and the first edition of *DMLU* has already become a classic.

We are pleased that he has allowed us to excerpt one of the entries from his second edition.

Please note that this is not just a defining dictionary, like *Black's* (which Garner also now edits); it is a dictionary of usage and style. It offers guidance on myriad questions of legal usage and style. For instance, should you say *pleaded* or *pled*? Is *prior* to better than *before*? How can we deal with the issue of gender-neutral style?

If there is one reference book that a legal writer must have, this is it.

—JK

PLAIN LANGUAGE. A. **Generally.** Albert Einstein once said that his goal in stating an idea was to make it as simple as possible but no simpler. If lawyers everywhere adopted this goal, the world would probably change in dramatic ways.

But there is little reason for hope when so many legal writers seem to believe that to seem good or competent or smart, their ideas must be stated in the most complex manner possible. Of course, this problem plagues many fields of intellectual endeavor, as the philosopher Bertrand Russell noted:

I am allowed to use plain English because everybody knows that I could use mathematical logic if I chose. Take the state-

ment: "Some people marry their deceased wives' sisters." I can express this in language [that] only becomes intelligible after years of study, and this gives me freedom. I suggest to young professors that their first work should be written in a jargon only to be understood by the erudite few. With that behind them, they can ever after say what they have to say in a language "understood of the people." In these days, when our very lives are at the mercy of the professors, I cannot but think that they would deserve our gratitude if they adopted my advice.

Bertrand Russell, "How I Write," in *The Basic Writings of Bertrand Russell* 63, 65 (Robert E. Egner & Lester E. Denonn eds., 1961).

But the professors have not heeded Russell's advice. Since Russell wrote that essay in the mid-1950s, things have gotten much worse in fields such as biology, linguistics, literary criticism, political science, psychology, and sociology. And they have gotten worse in law.

Consider the following statutory provision, a 272-word tangle that is as difficult to fathom as any algebraic theorem:

57AF(11) Where, but for this sub-section, this section would, by virtue of the preceding provisions of this section, have in relation to a relevant year of income as if, for the reference in sub-section (3) to \$18,000 there were substituted a reference to another amount, being an amount that consists of a number of whole dollars and a number of cents (in this sub-section referred to as the "relevant number of cents")—

- (a) in the case where the relevant number of cents is less than 50—the other amount shall be reduced by the relevant number of cents;
- (b) in any case—the other amount shall be increased by the amount by which the relevant number of cents is less than \$1.

(12) where, but for sub-section (5), this section would, by virtue of the preceding provisions of this section, have effect in relation to a relevant year of income as if, for the reference in sub-section (3) to

\$18,000, there were substituted a reference to another amount, being an amount that consists of a number of whole dollars and a number of cents (in this sub-section referred to as the "relevant number of cents") then, for the purposes of the application of paragraph 4(b)—

- (a) in a case where the relevant number of cents is less than 50—the other amount shall be reduced by the relevant number of cents; or
- (b) in any case—the other amount shall be increased by the amount by which the relevant number of cents is less than \$1.

Income Tax Assessment Act [Australia] § 57AF(11), (12) (as quoted in David St. L. Kelly, "Plain English in Legislation," in *Essays on Legislative Drafting* 57, 58 (David St. L. Kelly, ed., 1988)).

That is the type of DRAFTING that prompts an oft-repeated criticism: "So unintelligible is the phraseology of some statutes that suggestions have been made that draftsmen, like the Delphic Oracle, sometimes aim deliberately at obscurity. . . ." Carleton K. Allen, *Law in the Making* 486 (7th ed. 1964).

With some hard work, the all-but-inscrutable passage above can be transformed into a straightforward version of only 65 words:

If either of the following amounts is not in whole dollars, the amount must be rounded up or down to the nearest dollar (or rounded up if the amount ends with 50 cents):

- (a) the amount of the motor-vehicle-depreciation limit; or
- (b) the amount that would have been the motor-vehicle-depreciation limit if the amount had equaled or exceeded \$18,000.

Revision based on that of Gavin Peck (quoted in Kelly, *supra* at 59).

Few would doubt that the original statute is unplain and the revision is comparatively plain. True, the revision requires the reader to understand what a "motor-vehicle-depreciation limit" is, but some things can be stated only so simply.

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the State Bar's Plain English Committee. The assistant editor is George Hathaway, chair of the Committee. The Committee seeks to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

When it comes to the legislative jungle of the tax code, as Justice Robert H. Jackson once wrote, "It can never be made simple, but we can try to avoid making it needlessly complex." *Dobson v C.I.R.*, 320 U.S. 489, 495 (1943).

Still, some might protest that, after all, the law is a learned profession. Some seem to find an insult in the suggestion that lawyers should avoid complex verbiage. They want to express themselves in more sophisticated ways than nonprofessionals do.

Their objection needs a serious answer because it presents the most serious impediment to the plain-language movement. There are essentially four answers.

First, those who write in a difficult, laborious style risk being unclear not only to other readers but also to themselves. When you write obscurely, you're less likely to be thinking clearly. And you're less likely to appreciate the problems that are buried under such involuted prose. For the private practitioner, this could increase the possibility of malpractice.

Second, obscure writing wastes readers' time—a great deal of it, when the sum is totaled. An Australian study conducted in the 1980s found that lawyers and judges take twice as long deciphering legalistically worded statutes as they do plain-language revisions. Law Reform Comm'n of Victoria, *Plain English & the Law* 69-70 (1987; repr. 1990).

Third, simplifying is a higher intellectual attainment than complexifying. Writing simply and directly is hard work, but a learned profession ought not to shrink from the challenge. In fact, the hallmark of all the greatest legal stylists is precisely that they take difficult ideas and express them as simply as possible. No nonprofessional could do it, and most lawyers can't do it. Only extraordinary minds are capable of the task. Still, every lawyer—brilliant or not—can aim at the mark.

Fourth, the very idea of professionalism demands that we not conspire against non-lawyers by adopting a style that makes our writing seem like a suffocating fog. Unless lawyers do the right thing and reform from within, outside forces may well cause a revolution that will marginalize the legal profession. See LEGALESE, LEGALISMS AND LAWYERISMS & OBSCURITY.

B. Definitions. "Plain language," generally speaking, is "the idiomatic and grammatical use of language that most effectively presents ideas to the reader." Garner, *The Elements of Legal Style* 7 (1991). Some

have tried to reduce "plain language" to a mathematical formula, but any such attempt is doomed to failure. And that is no indictment of the idea: "[I]t is no criticism that Plain English cannot be precisely, mathematically defined. Neither can 'reasonable doubt' or 'good cause.' Like so many legal terms, it is inherently and appropriately vague." Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 Thomas M. Cooley L. Rev. 1, 14 (1992).

The fundamental principle is that anything translatable into simpler words in the same language is bad style. That may sound like a facile oversimplification that fails when put into practice—but it isn't and it doesn't.

C. An Old Idea. Of course, legal discourse has long been ridiculed for its incomprehensibility. Jonathan Swift skewered LEGALESE when he wrote of a society of lawyers who spoke in "a peculiar cant and jargon of their own, that no other mortal can understand." *Gulliver's Travels* 154 (1726; repr. 1952).

What is less well known than the ridicule is that good legal writers have long advocated a plain-language style. In the mid-19th century, for example, the leading authority on legislative drafting said that most legal documents can be written in "the common popular structure of plain English." George Coode, *On Legislative Expression* xxx (1842). A generation later, an English lawyer explained that good drafting "says in the plainest language, with the simplest, fewest,

and fittest words, precisely what it means." J. G. Mackay, *Introduction to an Essay on the Art of Legal Composition Commonly Called Drafting*, 3 Law Q. Rev. 326, 326 (1887). Other writers could be cited, decade by decade, up to the present day. In short, there is nothing new about the idea.

D. Plain-Language Principles. "No lawyer can now safely navigate," writes a well-known law professor, "without knowing the problems of legalese and the principles of plain English." Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. Rev. Law & Soc. Change 519, 573 (1984-1985). Experienced editors have arrived at these plain-language principles through induction—through carrying out the principles again and again. Once you have revised hundreds of legal documents for the purposes of clarifying and simplifying, you can fairly accurately predict what problems the next document might hold in store.

Of these principles, perhaps the most important is to reject the MYTH OF PRECISION. Traditionally, lawyers have aimed for a type of "precision" that results in cumbersome writing, with many long sentences collapsing under the weight of obscure qualifications. That "precision" is often illusory for two reasons: (a) ambiguity routinely lurks within traditional, legalistic language; and (b) when words proliferate, ambiguities tend to as well.

Of course, where clarity and precision are truly at loggerheads, precision must usually prevail. But the instances of actual



- ★ EMPLOYMENT AGREEMENTS ★
- ★ CONFIDENTIALITY AGREEMENTS ★
- ★ NONCOMPETITION AGREEMENTS ★
- ★ TRADE SECRETS ★ CUSTOMER LISTS ★

*We are highly experienced representing EITHER
the employer or the employee*

Referrals or Consultation

PAUL L. NINE, P.C.

Attorneys and Counselors at Law

100 WEST LONG LAKE ROAD, SUITE 102 ♦ BLOOMFIELD HILLS, MICHIGAN 48304
PHONE 810-644-5500 ♦ FAX 810-644-5640

conflict are much rarer than lawyers often suppose. Precision is not sacrificed when the drafter uses technical words where necessary and avoids JARGON that serves no substantive purpose. As one commentator puts it, "[W]hat is often called 'legal phraseology' is no more than inept writing or the unnecessary use of obscure or entangled phrases." Samuel A. Goldberg, "Hints on Draftsmanship," in *Drafting Contracts and Commercial Instruments* 7, 8 (Research and Documentation Corp. ed., 1971).

As a rule, whether one is drafting legislation, contracts, or other documents, clarity is just as important as precision. In fact, clarity helps ensure precision because the drafter with an obscure style finds it less easy to warrant what the draft itself says.

The main work of the legislative drafter is "to state the law in a form clearer and more convenient than that in which it has hitherto existed, and that is a task for experts . . ." J. L. Brierly, *The Law of Nations* 80 (5th ed. 1955). Of course, some influences leading to complexity cannot be overcome; among these are the difficulty of the subject matter itself and the fact that a final draft may reflect a compromise between different points of view. But, with hard work, other obscurantist influences—the ones that are linguistically based—can be overcome: long-windedness, needless jargon, and inconsistent style resulting from collaborative efforts.

The chief guidelines are as follows:

1. Achieve a reasonable average sentence length. Strive for an average sentence length of 20 words—and, in any event, ensure that you are below 30 words. Doing this involves following a maxim that, unfortunately, makes some legal drafters unnecessarily nervous: "[I]f you want to make a statement with a great many qualifications, put some of the qualifications in separate sentences." Bertrand Russell, "How I Write,"

in *The Basic Writings of Bertrand Russell* 63, 65 (Robert E. Egner & Lester E. Denonn eds., 1961). See SENTENCE LENGTH.

2. Prefer short words to long ones, simple to fancy. Minimize jargon and technical terms so that you achieve a straightforward style that nonlawyers as well as lawyers can understand. This means rejecting LEGALISMS such as *pursuant to* (under, in accordance with), *prior to* (before), *subsequent to* (after), *vel non* (or not, or the lack of it).

3. Avoid double and triple negatives. No reader wants to wrestle with a sentence like this one: "The investments need not be revalued at intervals of not more than two years if the trustee and the beneficiaries do not disagree." [Read: *If the trustee and beneficiaries agree, the investments need not be revalued every two years.*] See NEGATIVES (A).

4. Prefer the active voice. *Notice must be given* compares poorly with *The tenant must give notice* because (a) the first version does not spell out who must give notice, and (b) readers take in a sentence more easily if it meets their expectation of a subject-verb-object structure. See PASSIVE VOICE.

5. Keep related words together. In well-constructed sentences, related words go together—especially subject and verb, verb and object. See PHRASING.

6. Break up the text with headings. Headings and subheadings make the structure of a document overt, allowing readers to find their way around the document quickly and easily. See DOCUMENT DESIGN (C).

7. Use parallel structures for enumerations. See PARALLELISM, ENUMERATIONS & DOCUMENT DESIGN (F), (G).

8. Avoid excessive cross-references. The writer who becomes zealous about cross-referencing usually creates linguistic mazes. The problem is that readers are asked to hold in mind the contents of several different provisions simultaneously. For a choice example, see WOOLLINESS.

9. Avoid overdefining. Although definitions are sometimes helpful, legal drafters grossly overuse them. Whenever you send the reader elsewhere in a legal document to understand what you're saying in a given provision, you impede understanding. And many drafters "pass the buck" in this way repeatedly for a single term, by using cross-references in definitions. See—if you like, but this is not intended as a pass-the-buck cross-reference—DEFINITIONS (A).

10. Use recitals and purpose clauses. In contracts, recitals help the reader understand what the drafter hopes to accomplish; in legislation, purpose clauses serve this

function. Except in the simplest drafting projects—such as straightforward buy-sell agreements—you should generally presume that these orienting devices are necessary. And even simple documents should have descriptive titles (not *Agreement*, but *Agreement Restricting Stock Transfers*).

Finally, to gauge how effectively the principles are carried out, plain-language advocates recommend that certain documents be tested on typical readers. For documents that go out by the thousands and hundreds of thousands (like government forms) and for major legislation, time spent in testing at the front end can save enormous amounts of time and money in the long run.

E. Efforts to Use Plain Language. Since the 1970s, most American states have passed some type of plain-language legislation, and several federal statutes exist as well. See Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 *Thomas M. Cooley L. Rev.* 1, 31-35 (1992). Statutes of this type have not caused the problems that skeptics once warned of—unworkable standards, fatal ambiguities, decline in the quality of drafting. In fact, an empirical study would probably confirm precisely the opposite effects.

In addition to plain-language legislation, lawyers in many English-speaking jurisdictions have formed commissions and committees to promote plain language. In the U.S., for example, the State Bar of Michigan formed such a committee in 1979 and the State Bar of Texas in 1990; other state bar associations have begun to follow suit. In Australia, the Centre for Plain Legal Language has done much to promote the movement. In British Columbia, the Plain Language Institute thrived for a time and produced much good literature before being disbanded in 1993 for lack of governmental funding; other Canadian groups soon took up the slack. In England, the Plain English Campaign—a grassroots consumer organization—has met with considerable success. England is also the home of Clarity, an international organization that studies and promotes plain language in law. All these efforts have depended primarily on the determination of specific individuals.

Their opponents—the naysayers—have an increasingly difficult time as more and more excellent work is published in the field of plain language. For example, in 1994 Martin Cutts, an English writing consultant, redesigned and rewrote an act of Parliament: the Timeshare Act 1992. In doing so, he convincingly showed what

ANSWERS TO TAKE FIVE

1. False, Rule 8B, Rules of the Standing Committee on Professional and Judicial Ethics
2. True, Representative Assembly Minutes, 2/28/90
3. True, Representative Assembly Minutes, 9/13/90
4. True, Board Minutes, 3/3/95
5. True, Representative Assembly Minutes, 4/4/87

immense improvements are possible in legislative drafting if only the official drafters approached their task with a greater command of plain-language principles. See Martin Cutts, *Lucid Law* (1994). The enduring problem—here as elsewhere—is whether reform can take place while the old guard remains in place.

In some places, though, official and semi-official bodies are changing standard forms. For example, the English Law Society's 1990 and 1992 editions of the Standard Conditions of Sale use "language that is as direct as the subject-matter allows, sentences that are relatively short and jargon-free, and a layout that is clear." Peter Butt, *Plain Language and Conveyancing*, Conveyancer & Property Lawyer, July-August 1993, at 256, 258. Similarly, in 1992 the Law Society of New South Wales issued a "plainer" form of contract for the sale of land—"plainer" than its predecessor, though not yet quite "plain." *Id.* In the early 1990s, the Real Estate Forms Committee of the State Bar of Texas issued plain-language forms for deeds, deeds of trust, leases, and other forms. These are but a few examples.

For a challenging but partly tongue-in-cheek approach to a legislative mandate for plain language, see David C. Elliott, *A Model Plain-Language Act*, 3 Scribes J. Legal Writing 51 (1992).

F. The Trouble with the Word "Plain." It is unfortunate that the SET PHRASES *plain language* and *plain English* contain the word *plain*. For that word, to many speakers of English, suggests the idea of "drab and ugly." But plain language is not drab: it is powerful and often beautiful. It is the language of the King James Version of the Bible, and it has a long literary tradition in the so-called Attic style of writing. See Garner, *The Elements of Legal Style* 7-15 (1991).

Despite the unfortunate associations that the word *plain* carries, it has become established and is without a serious competitor. As a result, plain-language advocates must continually explain what they mean by "plain" language—or else critics and doubters will misunderstand it.

G. Prospects. We can point to significant progress in this area, but it remains sporadic. In the end, E. B. White may have been prescient: "I honestly worry about lawyers. They never write plain English themselves, and when you give them a bit of plain English to read, they say, 'Don't worry, it doesn't mean anything.'" E. B. White (as quoted in Thomas L. Shaffer,

The Planning and Drafting of Wills and Trusts 149 (2d ed. 1979)).

There are those who say that "lawyers spend half their time trying to understand what other lawyers wrote; and the other half of their days writing things that other lawyers spend half their time trying to understand." Samuel A. Goldberg, "Hints on Draftsmanship," in *Drafting Contracts and Commercial Instruments* 7, 10 (Research & Documentation Corp. ed., 1971). That cynical view holds true only when poor writing becomes pervasive; and, alas, there is some truth in it today.

Beyond the mere inconveniences of obscurity, however, people actually suffer from it. Not least among the sufferers are judges who must try to make sense out of nonsense. But the vexation that judges feel pales in comparison with the economic and emotional suffering that clients often experience.

It is hardly an overstatement to say that plain-language reform is among the most important issues confronting the legal profession. And until this reform occurs, the profession will continue to have a badly tarnished image—no matter how many other altruistic endeavors it carries out. If we want the respect of the public, we must learn to communicate simply and directly.

H. A Plain-Language Library. Those wishing to consult further sources in the field may find the following books helpful:

- Mark Adler, *Clarity for Lawyers: The Use of Plain English in Legal Writing* (1990).
- Robert D. Eagleson, *Writing in Plain English* (1990).
- Carl Felsenfeld & Alan Siegel, *Writing Contracts in Plain English* (1981).
- Rudolf Flesch, *The Art of Plain Talk* (1951; repr. 1978).
- Rudolf Flesch, *The Art of Readable Writing* (1949).

- Rudolf Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* (1979).

- Ernest Gowers, *The Complete Plain Words* (Sidney Greenbaum & Janet Whitcut eds., 3d ed. 1986).

- Robert Gunning, *The Technique of Clear Writing* (rev. ed. 1968).

- *How Plain English Works for Business: Twelve Case Studies* (U.S. Dep't of Commerce, Office of Consumer Affairs, 1984).

- Richard Lauchman, *Plain Style: Techniques for Simple, Concise, Emphatic Business Writing* (1993).

- *Plain English and the Law* (Law Reform Commission of Australia, Report No. 9, 1987; repr. 1990).

- *Plain Language: Principles and Practice* (Erwin R. Steinberg ed., 1991).

- *The Plain English Story* (Plain English Campaign, rev. ed. 1993).

- Richard Wincor, *Contracts in Plain English* (1976).

- Richard Wydick, *Plain English for Lawyers* (3d ed. 1994). ■

Bryan A. Garner is the president of LawProse, Inc., a Dallas company that has conducted more than 350 writing workshops for lawyers and judges. Apart from his books published by Oxford University Press,* he serves as editor-in-chief of The Scribes Journal of Legal Writing. Since 1992, he has acted as the style consultant on revising court rules for the Standing Committee on Rules of Practice and Procedure, an arm of the U.S. Judicial Conference. Later this year, the Government Printing Office will publish his Guidelines for Drafting and Editing Court Rules.

*The number for Oxford University Press is 1-800-451-7556.



Landex Research, Inc.

INTERNATIONAL PROBATE RESEARCH

**Missing and Unknown Heirs Located
With No Expense to the Estate**

International Service for:

- Lawyers
- Administrators
- Courts
- Trust Officers
- Executors

One North LaSalle Street, Chicago, Illinois 60602

Telephone: 800/844-6778 FAX: 312/726-6990