Plain English for Lawyers

THIRD EDITION

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Preface and Acknowledgments

The first edition of *Plain English for Lawyers* was a revised version of an article that appeared in 66 California Law Review 727, published by the students of the University of California, Berkeley, School of Law, copyright 1978, by the California Law Review, Inc.

Many of the changes made in the second edition and this third edition reflect the ideas, writings, and suggestions made by others who toil in the field of legal writing. My debts to them are so many that to acknowledge all of them properly in footnotes or endnotes would distract the reader—a sin that all of us in the field preach against. Thus, let me here thank my scholarly creditors in the United States, Great Britain, Canada, and Australia, including the following: Mark Adler, Robert Benson, Norman Brand, Robert Chaim, Robert Charrow, Veda Charrow, Martin Cutts, Robert Eagleson, J.M. Foers, Brian Garner, Tom Goldstein, George Hathaway, Margaret Johns, Joseph Kimble, Jethro Lieberman, Chrissie Maher, Ray Parnas, Janice Redish, and Richard Thomas. Thanks also to Keltie Jones, a member of the UCD Law School class of 1994, for her fine work on the punctuation chapter.

I owe special thanks to David Mellinkoff, Professor of Law Emeritus at the University of California, Los Angeles. All of us in the field of legal writing have benefitted from his careful scholarship and wise guidance expressed in *The Language of the Law* (1963), *Legal Writing: Sense & Nonsense* (1982), and most recently in Mellinkoff's *Dictionary of American Legal Usage* (1992).

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Davis, California
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Chapter 1

Why Plain English?

We lawyers do not write plain English. We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is "(1) wordy, (2) unclear, (3) pompous, and (4) dull."[1]

Criticism of legal writing is nothing new. In 1596, an English chancellor decided to make an example of a particularly prolix document filed in his court. The chancellor first ordered a hole cut through the center of the document, all 120 pages of it. Then he ordered that the person who wrote it should have his head stuffed through the hole, and the unfortunate fellow was led around to be exhibited to all those attending court at Westminster Hall.[2]

When the common law was transplanted to America, the writing style of the old English lawyers came with it. In 1817 Thomas Jefferson lamented that in drafting statutes his fellow lawyers were accustomed to "making every other word a 'said' or 'aforesaid' and saying everything over two or three

times, so that nobody but we of the craft can untwist the diction and find out what it means. . . ."[3]

Starting in the 1970s, criticism of legal writing took on a new intensity. The popular press castigated lawyers for the frustration and outrage that people feel when trying to puzzle through an insurance policy, an installment loan agreement, or an income tax instruction booklet. Even lawyers became critics. One lawyer charged that in writing as we do, we "unnecessarily mystify our work, baffle our clients, and alienate the public."[4]

The 1980s and 1990s brought progress toward reform. More than a dozen good books are now available for use in law school writing courses, and most law schools now stress the need for simplicity and clarity in legal writing. Some jurisdictions have passed statutes that require clear writing in governmental regulations, consumer contracts, voter materials, insurance policies, and the like.[5] New collections of jury instructions enable judges to convey the law more clearly to jurors.[6] Bar associations and other groups of lawyers and judges in the United States, Great Britain, Australia, New Zealand, and Canada have passed resolutions, created commissions, appointed task forces, and published tracts, all in the effort to improve legal writing.[7]

Progress, yes, but victory is not yet near. Too many law students report back from their first jobs that the clear, simple style they were urged to use in school is not acceptable to the older lawyers for whom they work. Too many jurors give up hope of comprehending the judge's instructions and rely instead on instinctive justice. Too many estate planning clients leave their lawyer's office with will and trust agreement in hand, but without fully understanding what they say. Too many people merely skim, or even ignore, the dense paragraphs of purchase agreements, apartment leases, employment

contracts, stock prospectuses, and promissory notes, preferring to rely on the integrity or mercy of the author rather than to struggle with the author's legal prose.

The premise of this book is that good legal writing should not differ, without good reason, from ordinary well-written English.[8] As a well-known New York lawyer told the young associates in his firm, "Good legal writing does not sound as though it had been written by a lawyer."

In short, good legal writing is plain English. Here is an example of plain English, the statement of facts from the majority opinion in *Palsgraf v. Long Island Railroad Co.*,[9] written by Benjamin Cardozo:

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

What distinguishes the writing style in this passage from that found in most legal writing? Notice Justice Cardozo's

economy of words. He does not say "despite the fact that the train was already moving." He says "though the train was already moving."

Notice his choice of words. He uses no archaic phrases, no misty abstractions, no hereinbefore's.

Notice his care in arranging words. There are no wide gaps between the subjects and their verbs, nor between the verbs and their objects. There are no ambiguities to leave us wondering who did what to whom.

Notice his use of verbs. Most of them are in the simple form, and all but two are in the active voice.

Notice the length and construction of his sentences. Most of them contain only one main thought, and they vary in length: the shortest is six words, and the longest is twenty-seven words.

These and other elements of plain English style are discussed in this book. But you cannot learn to write plain English by reading a book. You must put your own pencil to paper. That is why practice exercises are included at the end of each section. When you finish the section, work the exercises. Then compare your results with those suggested in Appendix I at the end of the book. You will find additional exercises in Appendix II.

Notes

1. David Mellinkoff, The Language of the Law 23 (1963).

2. Mylward v. Welden (Ch. 1596), reprinted in C. Monro, Acta Cancellariae 692 (1847). Joseph Kimble has pointed out that the person who wrote, and subsequently wore, the offending document may have been the plaintiff's son, a non-lawyer. Professor Kimble dryly notes that the son was probably following a lawyer's form. Joseph

Kimble, Plain English: A Charter for Clear Writing, 9 Cooley L. Rev. 1, n. 2 (1992), relying on Michele M. Asprey, Plain Language for Lawyers 31 (1991).

3. Letter to Joseph C. Cabell (Sept. 9, 1817), reprinted in 17 Writings of Thomas Jefferson 417–18 (A. Bergh ed. 1907).

4. Ronald Goldfarb, Lawyer Language, Litigation, Summer 1977 at 3; see also Ronald Goldfarb and James Raymond, Clear Understandings (1982).

5. For a list of plain English statutes in the United States, see Joseph Kimble, Plain English: A Charter for Clear Writing, 9 Cooley L. Rev. 1, 31–37 (1992).

6. For a list of recently published jury instruction books, see id. at 39–40.

7. For a list of these organizations and efforts, see id. at 40–58.

8. This premise is taken from David Mellinkoff, The Language of the Law vii (1963); see also David Mellinkoff, Dictionary of American Legal Usage vii (1992).

9. 248 N.Y. 339, 162 N.E. 99 (1928). I have used Palsgraf as an example because it is familiar to all who have studied law. In general, however, Justice Cardozo's writing style is too ornate for modern tastes. For good examples of modern plain English style, examine the opinions of retired United States Supreme Court Justice Lewis F. Powell or United States Circuit Judge Richard Posner.

Chapter 2

Omit Surplus Words

As a beginning lawyer, I was assigned to assist an older man, a business litigator. He hated verbosity. When I would bring him what I thought was a finished piece of work, he would read it quietly and take out his pen. As I watched over his shoulder, he would strike out whole lines, turn clauses into phrases, and turn phrases into single words. One day at lunch, I asked him how he did it. He shrugged and said, "It's not hard—just omit the surplus words."

How to Spot Bad Construction

In every English sentence are two kinds of words: working words and glue words. The working words carry the meaning of the sentence. In the preceding sentence the working words are these: *working, words, carry, meaning,* and *sentence.* The others are glue words: *the, the, of,* and *the.* The glue words do perform a vital service. They hold the working words together to form a proper, grammatical sentence.[1] Without them, the sentence would read like a telegram. But if the *proportion* of glue words is too high, that is a symptom of a badly constructed sentence.

A well constructed sentence is like fine cabinetwork. The pieces are cut and shaped to fit together with scarcely any glue. When you find too many glue words in a sentence, take it apart and reshape the pieces to fit together tighter. Consider this example:

A trial by jury was requested by the defendant.

If the working words are underlined, the sentence looks like this:

A trial by jury was requested by the defendant.

Five words in that nine-word sentence are glue: *a, by, was, by,* and *the*. That proportion of glue words is too high.

How can we say the same thing in a tighter sentence with less glue? First, move *defendant* to the front and make it the subject of the sentence. Second, use *jury trial* in place of *trial by jury*. The sentence would thus read:

The defendant requested a jury trial.

If the working words are underlined, the rewritten sentence looks like this:

The defendant requested a jury trial.

Again there are four working words, but the glue words have been cut from five to two. The sentence means the same as the original, but it is tighter and one-third shorter.

Here is another example:

The ruling by the trial judge was prejudicial error for the

reason that it cut off cross-examination with respect to issues that were vital.

If the working words are underlined, we have:

The ruling by the trial judge was prejudicial error for the reason that it cut off cross-examination with respect to issues that were vital.

In a sentence of twenty-four words, eleven carry the meaning and thirteen are glue. Again, the proportion of glue is too high.

Note the string of words, *the ruling by the trial judge.* That tells us that it was the trial judge's ruling. Why not just say *the trial judge's ruling?* The same treatment will tighten the words at the end of the sentence. *Issues that were vital* tells us that they were vital issues. Why not say *vital issues?* Now note the phrase, *for the reason that.* Does it say any more than *because?* If not, we can use one word in place of four. Likewise, *with respect to* can be reduced to *on.* Rewritten, the sentence looks like this:

The trial judge's ruling was prejudicial error because it cut off cross-examination on vital issues.

Here it is with the working words underlined:

The trial judge's ruling was prejudicial error because it cut off cross-examination on vital issues.

The revised sentence uses fifteen words in place of the original twenty-four, and eleven of the fifteen are working words. The sentence is both tighter and stronger than the original.

Consider a third example, but this time use a pencil and paper to rewrite the sentence yourself.

> In many instances, insofar as the jurors are concerned, the jury instructions are not understandable because they are too poorly written.

Does your sentence trim the phrase *in many instances*? Here the single word *often* will suffice. Does your sentence omit the phrase *insofar as the jurors are concerned*? That adds bulk but little meaning. Finally, did you find a way to omit the clumsy *because* clause at the end of the sentence? Your rewritten sentence should look something like this:

> Often jury instructions are too poorly written for the jurors to understand.

Here it is with the working words underlined:

> Often jury instructions are too poorly written for the jurors to understand.

The rewritten sentence is nine words shorter than the original, and nine of its twelve words are working words.

Exercise 1

Underline the working words in the sentences below. Note the proportion of glue words to working words. Then rewrite the sentences, underline the working words, and compare your results with the original sentences.

1. The testimony that was given by Reeves went to the