PLAIN ENGLISH FOR DRAFTING STATUTES AND RULES

By Robert J. Martineau
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PLAIN ENGLISH FOR DRAFTING STATUTES AND RULES

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FOREWORD

For the third time Professor Martineau, now joined by his son Robert J. Martineau, Jr., as co-author, has prepared a guide for drafting a statute or rule in Plain English. This book arises out of the experiences of both authors in the teaching of legislative drafting skills to both law students and professional drafters and extensive experience in drafting constitutional provisions, statutes, and administrative and court rules at all levels of government — federal, state, and local. It is based on the principles of Plain English as well as rules that govern the preparation of statues and rules.

While the basic approach of Plain English continues in this book, it incorporates substantial differences from the previous books as well as other advocates of Plain English. First, it expressly builds on the work of Jeremy Bentham, who first developed the core principles of drafting statutes in Plain English at the end of the 18th century, as well as that of E. B. White and William Zissner in 20th Century, who stressed the importance of the simple declarative sentence as a key component of clear writing.

We address this book to two audiences. The first is law students who are introduced to legal writing in their first year but usually are never called upon to engage in the discipline of structured writing that statute and rule drafting requires. The second is the lawyer (or even non-lawyer) who drafts a statute or rule as a staff member of a legislative committee, legislative drafting service, government agency, private organization, bar association, or private client.

In the modern world, statutes and rules play an ever-increasing role in the lives of almost every person. For this reason it now more important than ever for those who draft these statutes and rules to be able to make them as readable and understandable as possible. That is the goal of this book.

This book could not, of course, been written without the assistance of a number of people. At the University of Cincinnati College of Law, Dean Louis Bilionis was most supportive both financially and in offering encouragement. Assistant Dean James Schoenfeld was generous in ironing out practical details, and recent graduate Sarah Dwider, who assisted in the early research.

A special note of thanks is due to our research assistant, University of Cincinnati law student Krista Johnson. Not only did she do the usual type of research, she did much more — editing, finding examples of poorly drafted statutes and rules for the drafting exercises. She was also invaluable in converting all of the written material into the documents that were sent to our publisher. All of this did promptly and efficiently, while continuing as both a law student and law review staff member.

Robert J. Martineau
Robert J. Martineau, Jr.

(Disclaimer note: The view express in this book are those of the authors only and do not necessarily reflect those of the State of Tennessee or its Department of Environment and Conservation.)

DEDICATION

To our families, especially our wives Connie and Pam, without whose love and support this book could not have been written

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PART I

WHY STATUTORY AND RULE DRAFTING IS SO POOR AND HOW TO IMPROVE IT

Lawyers have two common failings. One is that they do not write well. The other is that they think they do.[1]

[1] Felsenfeld, *The Plain English Movement in the United States*, 6 Canadian Business Law Journal 413 (1981-82).

Chapter 1

THE NEVER ENDING STRUGGLE

A. THE HISTORIC PROBLEM OF POOR LEGAL DRAFTING

The problem of poor legal drafting goes back as far as there has been a legal profession. The reasons for it start with historic — the use of Latin and then a combination of Latin and French in legal documents following the Norman conquest of England in 1066. More simply, critics just blame lawyers. As one stated, "[l]awyers have two common failings. One is that they do not write well, and the other is that they think they do."[2] In saying this, he was echoing the comment made by Reed Dickerson, one of the first critics of the legal writing skills of both lawyers and law professors, that each group not only considers its members well-trained and expert legal drafters, but do not see writing inadequacies in other lawyers or law professors.[3]

We agree with both critics. We make this acknowledgely harsh judgment on the basis of a combined 75 years experience drafting constitutional, statutory, and rule provisions, writing appellate briefs, teaching writing skills to law students and legal professionals, as well as writing many books and law review articles. We also believe that part of the fault lies in our educational system, both pre-legal and legal.

In elementary (not coincidentally once known as grammar schools) and high schools, the role of English grammar, composition, and now even cursive writing have given way to all students being given the notebook version of a computer, eliminating the need for books and pencil and paper. These developments are not new. It was over a half century ago that Rudolph Flesch published his famous critique of primary education *Why Johnny Can't Read.* Since then, we have gone through the 1970s with open, unstructured classrooms with the focus on creative writing to the current teaching to the standardized test mandated by the "No Child Left Behind" Act that involves only a check in a box for an answer. Things are no better at the college level, where many if not most students can graduate without ever having written a paper or been faced with an exam that requires an essay answer.

The situation in law schools has traditionally been even worse. The mandatory first year legal research and writing course gives the illusion of teaching good legal writing skills without really doing so. The reasons for this failure are several-fold. First is the structure of the courses. Most of them call for a two credit course in each semester. The first semester includes legal research — how to use the law library and do legal research online. Attention is then given to legal writing, often with emphasis on the

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[2] *Id.*

[3] R. Dickerson, Legislative Drafting 3-4 (1954).

KISS (Keep It Simple, Stupid) principle. Students then write a short legal memorandum. The second semester is devoted to a moot court program in which the student writes a brief and makes a short oral argument in an appeal from a trial court decision, the "record" being only a two or three page summary of the lower court proceedings. Needless to say, the total amount of attention given to the legal writing aspect of the course is so limited as to be next to useless.

A further problem is the quality of the instructors in these courses. In many if not most law schools, they are recent law school graduates who have not yet practiced and who hold the position for only a year or two. Few have any experience in teaching writing skills or anything else. There is a minority of law schools that do have instructors who make a career of the position, but often they do not have full faculty status.[4] The result is, as might be expected, that most law students learn little about good legal writing in the first year. The fault is not in the instructors. They do the best they can. The fault lies in the system and especially in those in charge of the system. This is not surprising in light of Dickerson's comment noted above that most law professors consider themselves excellent legal writers.

There are additional opportunities in the second and third years, such as courses in legal writing (especially those using Richard Wydich's *Plain English for Lawyers*), courses in legislative drafting, as well as law review, but these reach only a small minority of law students. For the large majority, eight or ten hours of classroom instruction in legal writing by a neophyte instructor is all they are going to get. This situation fully justifies the criticism quoted above that the problem is that lawyers do not write well but think they do. Even worse, it supports Dickerson's further criticism that since law school professors do not see a problem with the legal writing skills of themselves or other lawyers, they see no reason for the law schools to do anything to correct the problem other than to let those few professors (and practitioners) who think there is a problem propose and teach a course in legal or legislative drafting.

One effort to improve the teaching of legal writing and the status of those who do it is the Legal Writing Institute, founded in 1984. It has publishesd The Journal of the Legal Writing Institute since 1988. An older organization, The American Society of Legal Writers, has a somewhat broader focus, legal writing in general. It publishes The Scribes Journal of Legal Writing.

B. EFFORTS TO IMPROVE LEGAL DRAFTING

In a curious twist, the effort to improve the quality of legal drafting in general began in the United States with the effort to improve legislative and rule drafting. Rudolph Flesh's first book in 1946, *The Art of Plain Talk*, was an an attack on the poor drafting of federal administrative rules affecting consumers. This defect made the rules difficult for consumers, the intended beneficiaries of the rules, to know and enforce their rights under the rules. To the same effect was his 1979 book *How to Write Plain English: A Book for Lawyers and Consumers.* Reed Dickerson's first book,

[4] There are exceptions, including the University of Cincinnati. For a review of efforts to give legal writing instructors faculty status, see Weresh, *Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 Golden Gate U. L. Rev. 281 (2007).

published in 1954, was *Legislative Drafting.* It was not until 1965 that he published *Fundamentals of Legal Drafting*, which was a project of the American Bar Foundation.

Since these early efforts, there has been a host of books and articles on improving legal drafting. While several of them focus on legislative and rule drafting, most of them have legal drafting in general or some aspect of drafting private legal documents such as contracts as their main focus. The best known is Wydick's *Plain English for Lawyers.* The largest publisher of books for lawyers lists over 20 books on legal drafting in its catalog, only one of which is on legislative and rule drafting.

Some federal agencies have gotten into the act. The Securities and Exchange Commission, for example, adopted rules in 1998 and 2006 requiring the use of Plain English in prospectuses and certain types of disclosure filings with the SEC. Individual states have adopted similar requirements for insurance policies and other types of consumer documents.

How successful have these efforts been? One indicator may be the form contract for the sale of real estate issued in 2010 jointly by the Florida State Bar (a body under the supervision of the Florida Supreme Court) and the Florida Board of Realtors. The contract is 11 pages long, contains 600 lines, and averages over 15 words per line, for a total word count of almost 10,000 words. A contract of this length, intended to be signed by persons with little or no experience in real estate, has a host of legal implications that are far beyond the understanding of those who sign it, not to mention the real estate agents presenting it for signature. At the very least, the contract requires each party to have its own attorney, something not usual in most real estate transactions that involve only private residences. (Of course, changing that situation may be the goal of the contract, at least from the perspective of the Florida Bar.)

C. THE SPECIAL PROBLEMS OF STATUTORY AND RULE DRAFTING

As bad as the state of legal writing in general is, the sorry state of statutory and rule drafting is far worse. The problem has, of course, the same root cause as poor legal drafting in general — the almost universal misconception of lawyers that they are expert legal drafters, as explained in the two previous sections. When it comes to statutory and rule drafting, however, the evils that flow from a poorly drafted statute or rule in most instances dwarf those that flow from a poorly drafted private legal document such as a contract. This is because a private legal document usually affects only a limited number of people, most of whom voluntarily become parties to the contract. They have an opportunity before being bound by the contract to review its terms and make a choice whether to enter the contract and to have legal advice when doing so. With a statue or rule, however, only a few of those affected by it have participated in its preparation, but all must comply with its provisions. Under these circumstances, the ability of these people — the public — to understand their rights and duties under the statute or rule is fundamental to its effectiveness. It is not too much of an overstatement to say that due process in the sense of notice requires that a statute or rule be written clearly enough so that those affected by it can read it and

understand their rights and duties under it.

The notion that a statute or rule must be written in language that the general public can understand has ancient origins. One of the first, the Statute of Pleadings, was enacted in 1362. Even though the statute itself was written in French, it required that pleas filed in court be "pleaded, shewed, defended, answered, debated, and judged in the English Tongue." It was not until 1489, however, that all English statutes were written in English. Even that preceded the adoption of English as the language of legal documents in 1649.[5]

In light of this history in England, it is not surprising that at the time of the American Revolution, important players such as John Adams and Thomas Jefferson criticized the language used in statutes. Adams called for "common sense in common language" in statutes, clearly a precursor of the Plain English movement. Jefferson was particularly forceful when he described statutes

> *which from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty by saids and aforesaids, by ors and by ands, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers, but to lawyers themselves.*[6]

The first effort to improve the quality of the drafting of statutes began in England by Jeremy Bentham at the end of the 18th century. In one of his many writings, *View of a Complete Code of Laws*, first published in 1843, some 11 years after his death but written much earlier, he called not only for the substitution of a code of laws for the common law, but gave detailed instructions of how the code should be drafted. Key to the whole enterprise was that the code be drafted in language the common person could understand. As he put it, laws should not be in "*any other legal terms than such as are familiar to the people.*" If it is necessary to use technical terms, they should be defined in the law in "*common and known words.*"[7] He also gave detailed instructions as to drafting style. These are discussed below in Chapters 10 and 12. As will be seen, his views on drafting style are very similar to the principles of Plain English as they have developed in the past half century. It is not an exaggeration to identify Bentham as the father, or perhaps the grandfather, of the Plain English movement.

Unfortunately, Bentham had little effect on the manner in which English statutes were drafted. The next effort was by George Coode in his book *Legislative Expression: or, the Language of the written Law*, published in 1845. He developed the notion of a statute involving a legal subject and a legal action, again a precursor of the Plain English movement's the "Who" and the "What." His other major contribution was to condemn the use of the proviso, advocating the placement of conditions at the beginning of the sentence rather than adding a proviso at the end of the sentence, a staple of Plain English style. Following him was Thring's *Practical Legislation*,

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[5] Ormond, *The Use of English: Language, Law, and Political Culture in Fourteenth-Century England*, 78 Speculum 750 (2003).The most extensive treatment of the transition from French to English in English legal proceedings and statutes is D. Mellinkoff, The Language of the Law 95-135 (2004).

[6] Mellinkoff, *supra* note 5, at 253.

[7] J. Bentham, Works 209 (Bowring, ed., 1843).