

Plain English for Lawyers

FIFTH EDITION

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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

Legal writing style long remained a subject of jokes and ridicule, but a reform movement started in the 1970s. A few legislatures

passed laws that require documents such as insurance policies and consumer contracts to be written in plain language. Banks, manufacturers, and other businesses discovered that documents written in plain language can reduce costs and increase profits. For example, an auto maker's clearly written warranty can help sell cars, and a lender's clearly written loan agreement can reduce costly defaults and foreclosures. Understandable government forms can reduce the amount of staff time spent answering questions from puzzled citizens.

The movement toward plain legal language is changing the legal profession itself. Most law schools now teach the plain language style in their legal writing courses. Court rules, such as the Federal Rules of Appellate Procedure, have been rewritten to make them easier for lawyers and judges to use. Diligent committees of experts are rewriting packaged jury instructions to help make legal doctrines understandable to the jurors who must apply them. Practicing lawyers become eager students in continuing legal education courses that teach clear writing.

Our profession has made progress, yes, but the victory is not yet won. Too many law students report back from their first jobs that the plain language style they learned in law school is not acceptable to the older lawyers for whom they work. Too many estate planning clients leave their lawyer's office with a 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 securities disclosures, credit card agreements, apartment leases, cell phone contracts, 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.⁴ 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.*,⁵ 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 the Appendix at the end of the book.

Notes

1. David Mellinkoff, *The Language of the Law* 23 (Little, Brown 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 (Federation Press 1991).
3. Letter to Joseph C. Cabell (Sept. 9, 1817), reprinted in *17 Writings of Thomas Jefferson* 417–18 (A. Bergh ed. 1907).
4. This premise is taken from David Mellinkoff, *The Language of the Law* vii; see also David Mellinkoff, *Dictionary of American Legal Usage* vii (West 1992).
5. 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 former United States Supreme Court Justice Lewis F. Powell or United States Circuit Judge Richard Posner.