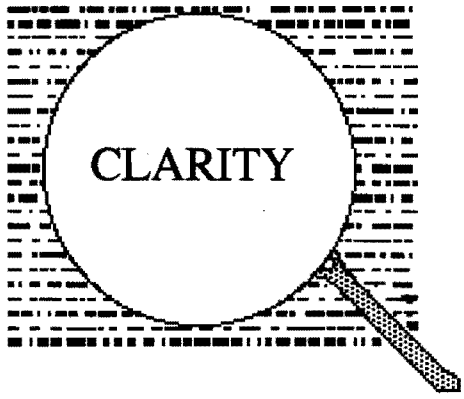

A movement to simplify legal language

Patron: Lord Justice Staughton

No 30: March 1994

Index

Copy on disc

Copy can now be read into this journal from IBM-compatible discs (which use DOS), as well as from discs written by a Macintosh.

If possible, please send copy exceeding 300 words on disc. The disc will be returned.

Notices

Professor John Adams and Trevor Aldridge QC to give CLARITY seminars

CLARITY to publish precedent book (volunteers sought)

Chairman to stand down

New treasurer sought

CLARITY at Solicitors' Conference: 7th Oct

Annual supper: 28th October

Details on pages 37 and 38

Computerised plain English legal forms

Laserform is a computer program which enables you to produce legal forms on plain paper by typing in only the variable information. It has 4,000 users, including solicitors, accountants, banks, and building societies. About 400 precribed forms are currently available.

Laserform is keen to add non-prescribed and practice forms to its library, and invites CLARITY members to supply plain English forms and precedents.

Documents and enquiries should be sent to S.A. Honey, Honeylaw, Top floor, Bradley House, Park Five Executive Business Centre, Harrier Way, Exeter, Devon EX2 7HU. Mr Honey is a specialist law stationer and computer expert (who was behind W.H.Smith's plain English guides).

Recruiting in Canada

We are grateful to the now closed Plain Language Office for letting us use their database to send a copy of this journal to their large Canadian audience. We hope those receiving it will excuse this one-off intrusion and use the application form on the back page to join CLARITY.

News

Canada

BC's Plain Language Office closes

The government of British Columbia is closing the Plain Language Office, its only plain language initiative, on March 31st.

The PLO was formed when the Plain Language Institute closed exactly a year earlier.

Updates

The Clearer Timeshare Act

Martin Cutts has almost completed his project putting the 1992 Timeshare Act into plainer language and improving its design. The sequel to his discussion paper *Unspeakable Acts?* will be published by June. Entitled *Lucid Law*, the project report will include the final version of the Clearer Timeshare Act 1993 and the results of testing the two Acts with about 90 student lawyers and 45 non-lawyers. Sir Thomas Bingham MR is contributing a foreword.

The draftsman of the original Timeshare Act, Euan Sutherland, has defended his work in a long article in the latest issue of the *Statute Law Review* (Vol 14, No 3). Martin Cutts says: "The whole idea of the discussion paper was to provoke debate. Many of the draftsman's points, which he sent me last year, clarified obscurities in his own Act and have been incorporated into my final rewrite of the revised version. The testing shows that the revised version is clearer and better understood than the original. It is also 25 per cent shorter and I believe it says the same thing."

Martin Cutts thanks CLARITY members who have offered comments and criticisms of the discussion paper. All will be acknowledged in the final report.

Lucid Law will be available from Words at Work, 69 Bings Road, Whaley Bridge, Stockport SK12 7ND, price £10 (UK), £12 (EC), £14 (elsewhere).

High Court forms

There was an overwhelmingly positive response to the draft plain language mareva and anton piller injunctions circulated around the profession and the financial institutions.

Mr Bill Heeler reported in March that Mr Justice Millett and Mr Justice Cresswell had reconsidered the documents in the light of the suggestions made, and that they should come into use soon after Easter.

Cases

"Without deduction"

The common provision that a tenant must pay rent "without any deduction" failed in the Court of Appeal recently.

Lords Justices Neill, Simon Brown, and Waite held that the word "deduction" was not sufficiently clear to exclude the tenant's equitable right of set-off.

Connaught Restaurants Ltd v. Indoor Leisure Ltd
The Law Society's *Gazette*
(16th February 1994, page 33)

The Crystal mark

The "crystal mark" of approval sold to clients of the Plain English Campaign is ambiguous.

The slogan *Clarity approved by Plain English Campaign* is intended to mean that PEC approves the clarity of the document bearing the logo, not that CLARITY is approved, nor (as some have thought on a casual reading), that CLARITY approved the document.

We have our own mark of approval, the CLARITY mark, and apply different standards. For instance, we would not accept the phrase "I hereby ..." which appears prominently in one crystal-marked document.

The CLARITY mark

Enquiries about the CLARITY mark should be sent to Richard Castle at the address on theinside back page. He has volunteered to coordinate the scheme.

The fee for vetting a document (unless its length justifies negotiation of a higher charge) is £100 + VAT, payable to the vetter. 10% is paid to CLARITY. If the document fails, CLARITY will recommend the services of a consultant to redraft it; the consultant's fee will then be negotiated as a private contract, but again 10% will go to CLARITY.

Legal drafting - a Scottish perspective

by David P. Sellar

Also printed in the *Journal of the Law Society of Scotland*
reprinted by kind permission of the author and of the *Journal*

David Sellar is a solicitor and teaches company law at Edinburgh University. He has been a company partner in a firm of solicitors and, before then, counsel at the Scottish bar. While at the bar he edited two volumes of Session Cases, the official reports of the Scottish courts.

The article by Mr Adler in the August 1993 issue of the *Journal*[1] trenchantly criticised the continuing use of what he described as traditional legal drafting. This paper attempts to develop the subject briefly from a Scottish perspective.

Mr Adler's argument is (1) that traditional legal drafting, characterised by "absurdly long sentences", is adopted only because of custom and, more significantly, (2) that that form of drafting materially obscures the intended meaning of a document, for the drafter as well as the client. Mr Adler justifies these criticisms by analysing a definition from an English commercial lease.

One can see that Mr Adler's criticisms apply equally to the general drafting of Scottish documents by taking as a short example this assignation of a book debt.

> We, X plc, having our registered office at [] in consideration of the sum of £190,000 paid to us by Y Ltd incorporated under the Companies Acts and having their registered office at [] as the price of the debt and the bond and floating charge hereinafter assigned of which sum we hereby acknowledge receipt hereby assign and transfer to the said Y Ltd and their assignees whomsoever all and whole our right, title and interest in and to a debt of £200,000 owed to us by A Ltd incorporated under the Companies Acts and having their registered office at [] in respect of goods sold and delivered by us to them and the liability of the said A Ltd to pay the said debt and our right title and interest in and to a bond and floating charge granted in our favour by the said A Ltd in security of the said debt and dated [] and registered on [] and we grant warrandice.

The form of assignation is certainly traditional. With the addition of the floating charge, it is basically the same form as those contained in the schedules to the Transmission of Moveable Property (Scotland) Act 1862, the *Scots Style Book* (vol 1, p. 443), which was published in 1903, and in the *Encyclopædia of Scottish Legal Styles* (vol 1, p. 343), which was published in 1935.

The present form of assignation also contains the characteristics which Mr Adler has identified. The text is unbroken and there is almost no punctuation. There are archaic words and phrases such as *thereof, therein* and *the said.* The word *hereby* is both archaic and unnecessary. There appears to be legal tautology and verbosity in the phrases *assign and transfer, right title and interest,* and *the liability of the said A Ltd to pay the said debt.* None of these is needed to achieve the objectives of a legal document, namely that it should deal comprehensively, precisely, and consistently with its subject matter. Nor is any of the language required as part of the law's technical vocabulary.

These are not merely stylistic criticisms because the form of the assignation, and in particular the verbose wording, obscure the meaning for the client, who is likely to regard it as mainly lawyers' jargon. The short example of the assignation fails, in fact, to highlight the point that in order to be clear a document must generally be concise. That point becomes clearer the longer a document is and the more complicated in legal or factual terms its subject matter is. If a document has to run to 100 pages to be comprehensive and precise, then it becomes all the more important to avoid any unnecessary wording.

A clearer example of traditional drafting materially obscuring meaning is a guarantee in the undivided form which is set out in the *Scots Style Book* (vol 3, para 79) and is still used by two Scottish banks. That form of guarantee contains in its dense prose a provision that the creditor may demand a deposit to secure the guarantee without being obliged to pay interest on that deposit. These are important commercial points, especially if the guarantee is securing a term loan. A client, particularly a professionally qualified finance director, should be able from reading the text to appreciate these implications of the guarantee.

[1] *Alphabet Soup*, also published in The Law Societies' *Gazettes* for Singapore (July/August 1993), Hong Kong (August 1993), England and Wales (1st December 1993).

The solicitors' profession now talks earnestly about improving the standards of legal service, often using such marketing jargon as *total quality* and *adding value*. One would have thought that a basic aspect of a legal service would be to produce a document which is as comprehensible to a client as is practical. Instead the Law Society's standard form *offer for sale* continues to talk of the exclusion of the *actio quanti minoris*, when the provision could be expressed quite easily in English.

It is, therefore, hardly surprising that clients of all kinds cynically consider that lawyers are paid by the word. In company transactions "the legals", as they are often termed, are seen by clients and their financial advisers as, at best, boring and costly.

The form of documents is particularly relevant to Scottish practitioners, especially in company work, the market for which is an increasingly British one. If their documents continue to look old fashioned, so will the Scottish firms in comparison with the London firms who have adopted more modern drafting techniques. This is material when some Scottish companies, and even more their merchant banks, are notoriously reluctant to use Scottish firms for their largest transactions.

As Mr Adler noted briefly, traditional drafting also increases difficulties for lawyers in drafting and revising documents. Undue dependence on styles makes it harder to draft original provisions, particularly on unfamiliar subjects. Computer contracts are only the most obvious example. Equally, traditional drafting makes it far more difficult properly to revise documents. The traditional form of a disposition, particularly the use of the first person and the absence of definitions, makes it very difficult to deal precisely and consistently with complicated subjects. The writer recalls a litigation arising out of the sale of a commercial property in which the disposition contained virtually unintelligible provisions on the calculation of a very large deferred consideration.

It is worth adding here that the lawyer's ability to draft and revise largely depends in practice on the ability of the client and other advisers to understand documents in draft or as revised for the other party. A client who does not understand cannot give proper instructions.

Having confirmed that Mr Adler's criticisms apply at least as much to Scottish as to English drafting, it is useful to consider further the reasons for traditional drafting.

As Mr Adler points out, the immediate reason for traditional drafting is a very understandable reluctance to alter an accepted method and accepted wording. Traditional drafting and its wording in turn demonstrate the continuing dominant influence on Scots law of conveyancing of heritage. Until fairly recently commercial law was even seen as essentially part of conveyancing. Professor Halliday's *Conveyancing Law and Practice* is the last great illustration of this approach, dealing with employment and even construction contracts as part of his general subject.

The influence of conveyancing can be seen particularly in the undue emphasis on the formal validity of documents on which London solicitors so often remark. The most obvious recent example was the virtual panic about the highly arguable defects in the first section 36B of the Companies Act 1985 (as added by the Companies Act 1989) on the law of execution by companies (see the remarkable series of articles in 1990 SLT (News) 241 and 369, 1990 35 JLSS 358 and 498, and 1991 SLT (News) 283 and 487). It is ironic that in all the scholarship on ancient legislation no-one put the difficulties into perspective by pointing out that companies can safely sign most agreements without complying with the requirements for formal validity (see, for example, the clear words of Lord Justice Clerk Alness in *Beardmore v. Barry* (1920 SC 101) on the width of documents of a commercial nature (or, in the traditional term of Scots law, documents *in re mercatoria*).

Against this background it is understandable that the basic techniques for drafting a disposition have been largely used to draft commercial and company agreements. Ultimately, an English document is used if there is no Scottish style to adopt. Professor Halliday uses an English assignment of a trade mark (see above, vol 1, para 7.47). This approach is far from new, as can be seen from the English forms of assignation of patents and copyright in the *Scots Style Book* (vol 1, pp. 454-457).

The conveyancing background is, of course, not the only reason for the continued use of traditional drafting. Companies' articles of association are usually still drafted by the traditional method, primarily because they are based on Tables A in the nineteenth century legislation and on the precedents drafted by Sir Francis Palmer at the turn of the century. The conveyancing background is in any event changing as the solicitors' profession becomes more sophisticated, even down to the emergence of specialised banking and pension lawyers.

There may be a further and more fundamental aspect to the reluctance to give up traditional wording. That reluctance may imply that Scots lawyers are as a whole so unsure of basic principles that they cannot identify clear legal tautology.

Taking again the example of the assignation of a book debt, it is quite clear that the words *assign and transfer* are tautologous (see, for example, the express statement by Lord Justice Clerk Inglis in *Carter v. McIntosh* (1862 24 D 925)). The assignation also contains the familiar phrase *right, title and interest*. It is very difficult to see any difference between these terms in relation to the sale of a book debt as opposed to a revenue statute. It should be sufficient to

use a phrase such as *all rights*. The concept of a right is sufficiently wide to include even a *spes successionis* (or, in English terminology, an expectancy) (see, for example, *Wright v. Bryson* (1935 SC [HL] 49, by Lord Alness at p.54). If there were a reasonable doubt over the meaning *in this context* of such basic concepts as a right and an interest, that would be rather more alarming for Scots law.

Traditional legal education in Scotland may also have contributed to that reluctance to change an established approach, which sustains traditional drafting. There may still be too much emphasis on the law as expressed in disputed case law and too little on the use of the law to achieve particular objects without dispute. The latter is more constructive but also more difficult. It requires a clear knowledge of both the relevant law and the ways in which it can be most clearly set out. Ironically, the only course which has traditionally required such positive drafting is conveyancing.

There is an interesting contrast here with legal education in the United States, in which far greater emphasis is given to drafting. As long ago as 1951 Cook's *Legal Drafting* provided a very detailed treatise for student readers. That book contained drafting exercises with excerpts from relevant case law and previous literature.

A further irony is that the basic principles of more modern drafting are not difficult. Mr Adler has made certain very useful comments on the purpose of a definition. There is space here to add only briefly to his basic point that simplicity is clarity.

Definitions materially assist in drafting substantive provisions which satisfy the criteria of good drafting. The document should be understandable and concise as well as comprehensive, precise, and consistent. The most convenient way to deal with a complicated agreement seems, therefore, to increase the number of definitions, so as to limit the "substantive provisions". These provisions are then set out in short, simple sentences in the active mood. Each reference should ideally contain only one obligation. The provisions should also clearly follow some logical order.

The resulting agreement will admittedly not be elegant but it should be as short, clear, precise, and consistent as possible, even where it deals with highly technical matters. Equally, it should be far easier for a lawyer and client to revise than an agreement drafted using the traditional method.

The result of the use of this more modern method can be seen by again taking the example of the assignation of the book debt. The text of the assignation, including recitals in English form, would read:

WHEREAS:

A. X [defined in heading] is owed £200,000 by A Ltd, the price of goods sold by X to A.

B. A has granted X a floating charge dated [] and registered [] to secure the debt.

C. Y [defined in heading] is to buy the debt from X for £190,000.

THEREFORE:

1. X assigns to Y with immediate effect all its rights in (1) the debt and (2) the floating charge.

2. X acknowledges receipt of the price from Y.

3. X warrants that the debt is payable by A.

The form is shorter and, it is hoped, clearer than the traditional form. The familiar first person has not been used because it is not really consistent with definitions. In a short document the recitals replace a clause of definitions. As already noted, the advantage of a document being succinct is seen better in a more complicated document than the assignation.

The modern drafting method derives from that used by the United Kingdom Parliamentary counsel. This point is developed in detail in the excellent, and essentially practical, *Drafting Commercial Agreements* written by a distinguished London practitioner, A.J. Berg. That book is based closely on an internal guide used by his former firm.

There is, however, one major practical difficulty in revising existing standard form documents using the modern method. It would inevitably require time and therefore money. It would, however, be a very useful investment, as most City of London firms have accepted, and the very largest Scottish firms are also appreciating. Solicitors seem willing enough to spend lavishly on ever more ostentatious notepaper and advertisements.

This article merely touches on the subject. Its argument can, however, be summarised briefly. Mr Adler's criticisms of traditional drafting clearly apply to Scottish drafting. Traditional drafting leads to verbose and too often unclear drafting, which in turn bewilders clients and increases the risk of serious mistakes. Clear and concise drafting should therefore be an essential part of a lawyer's service. More generally, traditional drafting arises directly from the continuing influence on Scots conveyancing law. It probably arises also indirectly from an empasis in legal education on the law as shown in litigation. The main reason why very few solicitors in Scotland have not adopted the modern method of drafting is ironically not any difficulty with that method but a failure to appreciate fully the importance of drafting.

Edited extracts from

So people can understand

a proposal of a law to improve legal writing

by Philip Knight

published by The Plain Language Institute and reprinted with the kind permission of Philip Knight of the Plain Language Office

Preface

In *Walters v. Scholarship Consultants of North America* (an unreported 1993 decision of the Provincial Court of British Columbia), an investment company's "very well educated" agent presented "trusting and only modestly educated" clients with a set of contract documents. The judge described them as having wording so "absurdly complex" that the clients could not understand that the investment was "structured in a manner that presents a very significant pitfall for the unwary". Nevertheless, the court upheld the contract because there was nothing legally wrong with it.

This discussion paper is the culmination of three years consideration by the Plain Language Institute. It proposes an answer to the question, "Should British Columbia pass a law requiring the use of plain language in legal writing?".

Several people conducted studies to support this, and wrote their own papers. Four of them are included in Volume 2 as follows:

1. **Why we can't leave language to the courts**

   Vancouver law graduate Rachel Hutton reviews the state of common law on the subject. Her article is based on research conducted for the Institute by Vancouver lawyer Mark Hicken.

2. **More than just consumer protection: The American experience**

   Vancouver lawyer Graham Bowbrick reviews the long American experience with plain language law, and canvasses the major issues addressed in the professional literature.

3. **Closer to home**

   Alberta lawyer David Elliott explains the background to the plain language sections of the Financial Consumers Act 1990, describes the United States' experience with similar laws, and suggests some ways of complying with plain language sections.

4. **But does it work?**

   This part is compiled by Jeanne Pasmantier of New Jersey's Department of Law and Public Safety. It was originally published in Clarity *26 (December 1992, p.12).*

Volume 3 sets out the data on which the report is based. It contains the results of research into the views of BC citizens and support agencies about "public documents" (of which legal documents were one category); it includes a 70-page summary of plain language legislation in the US, broken down into details as in the example in the box below; and an annotated bibliography on the subject of plain language laws.

Criminal justice

Arrest, charges & indictments

Grand jury

Colorado 16-5-201 requires any accusation or indictment written by a Grand jury and directed to individuals and the court to state the offence in the terms and language of the statute defining it, or so plainly that the nature of the offence may be easily understood by the jury. This imposes a subjective language test, and may be enforced by unique remedies set out in the Act.

Georgia 17-7-54(a) requires any accusation or indictment written by a Grand jury and directed to individuals and the court to state the offence in the terms and language of this Code, or so plainly that the nature of the offence charged may be easily understood by the jury. This imposes a subjective language test, and may be enforced by unique remedies set out in the Act.

The preface continues

I began my work with PLI three years ago with a strong belief that language ought not to be legislated for any reason. I believed then, and I still believe, that to remain vital and alive language should be free to evolve and change. But I have come to understand that the issue has less to do with regulating legal language than with regulating legal documents so they are effective.

Legal language is peculiar, and the peculiarity is socially entrenched; not by evil will or ill motive, but by habit, attitude, neglect, established process, and the routine and cares of daily business. But that is not cause for legislation. However, the peculiarity of legal language results in documents which create misunderstanding, and are a direct cause of injustice, and that is cause for government to intervene. So I have come to agree with Prof Mellinkoff, in *Legal Language: Sense and Nonsense* (1982):

> It would be better that legal writers mend their ways on their own; they can. But without the goad of some legislation, they won't. They need some encouragement, and not only on "consumer" agreements.

In this paper, I advocate using legislation; not to regulate the language, but to achieve the goal of clear and effective legal documents, and to correct the effects of a peculiarity which serves no legitimate or constructive social purpose, but which causes unacceptable social injustice.

Summary

The government of British Columbia should pass a law requiring legal documents to be written clearly enough that people who have to read and act on them may do so easily. I base this conclusion on research and study conducted by the Plain Language Institute over the past three years.

This is a summary of the essential points made in this paper.

1. Legal documents are written with goals of certainty and precision in mind. They are not normally written with a goal of effective communication. Consequently, they do often do not communicate their messages effectively.

   - Comprehension levels for six documents tested by 74 adults ranged from a low of 23% to a high of 54%. with an overall average of 43%. More than half the message in typical legal documents is lost.
   - Comprehension levels for legal documents rewritten in plain language improved between 30% and 50% in a controlled test.
   - When traditional consumer statements were replaced with plain language statements, hydro customers became more sensitive to price variations reflected on their bills.

2. Because legal documents are hard to understand, people lose rights, lose money, lose self-esteem, lose independence, and money is wasted on administrative inefficiency.

   - People do not get the assistance they need from government offices because they cannot understand complex forms.
   - People do not receive money or other benefits to which they are entitled by law, because they cannot understand program announcements, rules or foms.
   - People do not understand decisions that affect them.
   - People feel foolish and insecure because they cannot understand documents which they know are important to them.
   - Support agencies, funded by government, divert an average 15% of their time and energy to assisting clients to understand legal documents. The time taken for this unfunded work is worth millions of dollars each year.

3. People dislike the language of legal documents because it makes important messages hard for them to understand.

   - 57% of BC adults rate legal documents hard to understand.

> Two ordinary people sit down to write out a simple contract. They get off to a good, precise start with two words:
>
> **We agree ...**
>
> Soon the good start stumbles. They get help. They start over. The contract now says nothing more than it said before, but there is more of it:
>
> **In consideration of the agreements herein contained, the parties hereto agree ...**
>
> An aroma as distinctive as stale cigar fills the room. A lawyer has been here. Or someone trying to imitate one.
>
> D. Mellinkoff: *Legal Writing: Sense and Nonsense*

- More than 60% rate legal documents important to understand.
- Only 30% believe lawyers and public servants really try to communicate when they write legal documents.
- 64% feel frustrated and angry when they have to read legal documents.
- 87% would choose a plain language mortgage over a traditional one if given a choice.
- 61% of those who prefer a plain language mortgage would be willing to pay a one-time fee for the advantage of getting plain language.

4. British Columbians support government action to solve this problem.
   - 92% of BC adults agree government should pass a law requiring legal documents to be in plain language.
   - 48% agree this should be a top priority for government action.
   - 65% agree government should spend taxes to enforce such a law.
   - 64% agree government should spend taxes to educate public servants to write more clearly.
5. Writers can change the way they write, and can become effective communicators. They need something to stimulate and focus that ability, and to act as a counterfoil to all the combination of forces which resist change in their working culture.

According to the Canadian Bar Association, effective communication can be compatible with certainty and precision. The Association task force on Plain Language Documentation wrote (at p.17 of their report):

> In our view, plain language drafting will increase the level of certainty in a document because the [plain language] drafting style forces the writer to pay attention to the context of the words and the form of the document.

> "I find it very suprising." he began, after some reflection, as he returned the letter to his mother... "He is a businessman, a lawyer, and his conversation is even ... pretentious, and yet his letter is really illiterate."
>
> "Well, but they all write like that," said Razumikhin abruptly.... "It is only the special legal style, ... all legal documents are still written like that."
>
> Feodor Dostoevsky: *Crime and Punishment*

The government has several options available to respond to the public call for action on this problem.

- Leave the market to itself, and the regulation of legal documents to the courts.
- Use moral suasion and resources to encourage writers to "do the right thing", and provide for voluntary change in writing.
- Use executive authority to compel change among people who create government documents.
- Use administrative authority to stimulate change among writers whose work is financed or regulated by existing agencies of government.
- Use legislative authority to stimulate change among writers whose work is within provincial jurisdiction. Legislation has been used to regulate various aspects of legal writing:
  - (a) The vocabulary;
  - (b) The structure and appearance of the document;
  - (c) The mechanics of creating documents;
  - (d) The effect of legal writing.

6. The government should act within its legislative authority. Legislation should have the following features:
   - It should regulate (d) above, rather than (a) to (c); that is less invasive and more effective.
   - The standard for compliance should be that documents are created in such a way that the people who have to read and act on them can do so easily. This definition should be supported by a non-exhaustive list of criteria to guide interpretation of the standard.
   - It should seek to promote compliance rather than punish recalcitrants. The enforcement mechanisms should include a wide range of powers to the courts to give effect to this principle.
   - It should apply to almost all legal documents which involve parties in unequal bargaining positions, with a preference to include rather than exclude documents.
   - It should create:

Continued on p.13 »»

Better drafting

The pleading on the right was recently served. It contains many typical drafting errors, and we offer it annotated and revised.

PARTICULARS OF CLAIM[1]

1. The Plaintiff[2] was employed by[3] the Defendant as a shop manager at the Defendant's premises[4] situated at[5] Brown's Stationery[6], Unit 34, Byenow Shopping Precinct, Hammersmith, London[7], between January 1990 and February 1991.
2. The provisions of[8] the Offices, Shops and Railway Premises Act 1963[9] applied to the said[10] premises[11, 11a].
3. On the 15th day of[12] September 1990, while acting in the course of her employment[13], the Plaintiff, whilst[14] walking downstairs carrying a light bag of rubbish,[15] in the said premises[16], suddenly[17] and without warning[18] snagged her foot on some frayed carpet[19] causing[20] her to fall.
4. The said accident was caused or contributed to by[21] the negligence and/or[22] breach of statutory duty of the

»»

[1] It is a pity that the heading is in "typewriter" style - using the same font, style, and size of type as the text. Word-processors offer greater variety.

[2] "Plaintiff" and "defendant" are not proper nouns, and do not deserve capitals.

[3] The customary passive is pointless and verbose. "The defendant employed the plaintiff" is identical in meaning, but shorter.

[4] "Premises" repeats "shop". Better: "as manager of the defendant's shop".

[5] Only lawyers say "situated [or situate] at" instead of "at".

[6] The shop was not at Brown's Stationery: that was its name.

[7] The postal district and code are usually included, but I agree with the drafter here. There was no dispute about the location of Hammersmith, and postcodes are of no help to the court.

[8] "The provisions of" adds nothing, but "Section 16 of" would have been helpful.

[9] Although s.16 has been replaced it remains in force for existing premises until December 1995.

[10] "Said" is mere pompous repetition of "the".

[11] "Shop" would do better than "premises", since that is what it was.

[11a] Is this pleading of law necessary?

[12] "Day of" is otiose, and "the" is often omitted without loss. Many prefer "15 September 1990".

[13] It is necessary to show that a wrongdoer was acting in the course of employment to make the employer vicariously liable. It has no bearing here.

[14] "While A and whilst B" could be replaced by "While A and B". Or better: "While [or whilst] walking downstairs in the course of her employment".

[15] A comma has no place after "rubbish".

[16] The reference to the shop should follow "downstairs". The drafter has started explaining where the accident occurred, broken off in the middle to explain what the plaintiff was doing, and then completed the details of the location.

[17] If "suddenly" had been omitted, would the employer have denied liability on the ground that the accident happened gradually?

[18] As "the plaintiff" is the subject of the sentence, it sounds as though she is complaining that she did not warn herself.

[19] A comma is missing.

[20] If "the plaintiff snagged her foot" is the subject of "causing her to fall", as intended, it must be "causing *herself* to fall".

[21] This clumsiness is the consequence of a quite unnecessary passive verb.

[22] The plaintiff is pleading both negligence and breach of statutory duty, so "and" is appropriate. If one of those pleas fails the other will stand or fall on its own merits, so "or" is unnecessary. "And/or", widely criticised as meaningless, has led to a great deal of inconclusive litigation about its exact meaning, and in *Vilardo v. County of Sacramento* (54 Cal App 2d 413) was held fatal to a pleading. In *Gurney v. Grimmer* (Lloyds List Law Reports, 44 [1932] 189) Scrutton LJ said: "I am quite aware of the habit of some business people and some lawyers of sprinkling "and/or's" as if from a pepperpot all over their documents without any clear idea of what they mean by them, but simply because they think it looks businesslike."

Defendant, its servants[23] or[24] agents[25,26,27] acting in the course of their employment.

Particulars[28] of negligence and/or breach of statutory duty[29,30]

The defendant, its servants or agents were negligent and/or in breach of statutory duty in that they[31]:

(a) failed adequately or at all in time or at all until after the Plaintiff's accident[32,33] to examine, inspect[33a], repair[34] or maintain the stair carpet[35] which was defective and dangerous as aforesaid[36];

(b) failed to cover the worn and dangerous area of the said stair carpet;

(c) caused, permitted, required or suffered[37] the Plaintiff to work as aforesaid[38] or in the aforesaid location[39] when it was unsafe so[40] to do[41];

(d) exposed the Plaintiff to a danger or a trap or a foreseeable risk of injury;[42]

(e) failed to warn the Plaintiff of the dangers of working as aforesaid;

(f) failed soundly[43] to construct[44] or properly to maintain the stairs or keep them free from obstruction[44a] contrary to Section[45] 16(1) of the said Act of 1963[46] or at all[47];

(g) failed to provide or maintain[48] for the Plaintiff[49] a safe system of work;

»»

[23] Retailers have employees, not servants, at least for these purposes. No-one was suggesting that the carpet was neglected by the defendant company's housemaid.

[24] The "or" is used inconsistently with the previous "and/or", and wrongly. The plaintiff is pleading breach of statutory duty by the defendant *and* negligence by both the defendant *and* its employees.

[25] What agents, as opposed to employees, does the plaintiff say were acting in the course of their employment by the plaintiff?

[26] Another comma is missing.

[27] This would read better as "the defendant or its servants or agents".

[28] Anyone but a lawyer would say "details" rather than "particulars".

[29] As the details relate only to clause 4, the heading should be indented with the rest of that paragraph.

[30] The muddling of facts pleaded to establish negligence with those pleaded to establish breach of statutory duty suggests that the drafter did not know the difference. Such ignorance is a recipe for embarrassing failure.

[31] This repeats unnecessarily what was said immediately above. It should say that the defendant negligently failed (etc) rather than that the failures were of themselves negligent.

[32] How is "or at all until after the Plaintiff's accident" different from "in time"? The "or at all" construction can be overused.

[33] "Failed ... to examine" are separated by too long a subordinate clause. The point of the sentence ("failed to examine...") should come nearer the beginning so that the reader can make sense of the detail ("adequately", etc) whilst reading it.

[33a] The plaintiff is in some difficulty here: if anybody should have noticed the fault in the carpet it was she, as manageress. This leads to the question (which I leave open here) whether the plea of negligence adds usefully to the plea of breach of statutory duty (which under s.83(1) of the Act gives rise to civil liability).

[34] A comma between the penultimate item in a list and the conjunction is sometimes necessary to avoid ambiguity (A, B and C, and D). Although that is not the case here, it is a useful habit.

[35] The absence of a comma after carpet changes the sense to the unintended "failed to maintain the defective (as opposed to some other) carpet". The drafter has omitted the causative link between the failure to maintain and the defect.

[36] "As aforesaid" is mere verbiage as well as plain wrong. It had not been previously mentioned.

[37] The artificial "caused" and "suffered" add nothing to the more natural sounding "required" and "permitted" respectively. And the separation of the pairs shows disorganised thought.

[38] Presumably this refers to clause 3, but the cross-reference is so vague that at first I thought it was a mistake.

[39] More verbiage.

[40] Does "so" refer to "caused (etc)" or to "work"?

(h) failed to take any [50] or any [51] adequate care for the safety of the Plaintiff.

[52]

5. By reason of[53] the matters[54] aforesaid[55] the Plaintiff[56] who is now aged 27 years[57] having been born on 13th October 1966 suffered pain, injury, loss and damage[58].

Particulars of injury[59]

Pain[60]. Shock. Bruising[61]. A jarred back requiring taking[62] analgesics and resulting[63] in the plaintiff being absent[64] from work for 3[65] weeks.

6. Further[66] on the 6th day of December 1990 while acting in the course of her employment the Plaintiff while carrying a small box of damaged cards down the said stairs caught her foot on a diagonal tear in the carpet causing her to fall down the remaining flight of[67] stairs.

....[68]

8. By reason of these further matters[69] the Plaintiff »»

[41] The inversion of the last three words - instead of "to do so" - is another pompous affectation.

[42] This paragraph repeats in three different ways what has already been said.

[43] Did the defendant soundly fail? This ambiguity is created by the artificial placing of the adverb. Why not "to construct soundly"?

[44] What has the construction of the stairs to do with the plaintiff tripping over the carpet?

[44a] Another comma is missing.

[45] "Section" does not justify a capital.

[46] No other Act has been mentioned, so "of 1963" is otiose.

[47] "Failed ... contrary to section 16 ... or at all" does not make sense.

[48] More doubling. Presumably the defendant had originally provided a safe carpet, even if it had not been maintained.

[49] For who else?

[50] "Failed to take any care" is untenable: the defendant did provide a staircase rather than a hole in the floor.

[51] "Any or any adequate" is clumsy. The drafter means "failed to take adequate care".

[52] The particulars are typically over-egged. The plaintiff tripped over a worn carpet, and blames the defendant for its inadequate maintenance. If she proves that, the other allegations will be irrelevant; if she does not, they will fail.

[53] "By reason of" is wrong and sounds odd: the details are causes, not reasons.

[54] Nor are they "matters".

[55] "By reason of the matters aforesaid" = "Consequently".

[56] "Who is now aged 26 years having been born on 13th October 1966" has nothing to do with the rest of the sentence, and should not be embedded in the middle of it. But if it is there it should be surrounded by commas or brackets.

[57] Another comma is missing here.

[58] What does "damage" add to pain, injury, and loss?

[59] The format of this heading is inconsistent with that of the details of negligence, in that it is centred instead of left-justified.

[60] As pain was pleaded separately from injury, it should not be repeated as a detail of injury.

[61] "Bruises" would be consistent with the syntax of the other details.

[62] "Requiring taking" is clumsy and ungrammatical. "Requiring analgesics" would do.

[63] This implies (wrongly?) that the first three details played no part in the absence from work.

[64] "Resulting in the plaintiff being absent" = "resulting in the plaintiff's absence".

[65] Although the rules call for the use of figures rather than words, the use of a single digit in this way looks odd. [See Bryan Garner's note (*Clarity* 29, p.14) and Dr Eagelson's reply (this issue, p.14).

[66] This "further" signals the end of the part of the pleading relating to the September fall (paragraphs 3 to 5) and the beginning of the part relating to a second fall, in December, (paragraphs 6 to 8). Yet "further" looks as though it relates only to paragraph 6. It would have been better to group each set of paragraphs under a heading ("First accident", "Second accident").

[67] Did she fall down the next (and last) flight, or down the remaining stairs in that flight? It would have been more informative to say how many stairs she had fallen down.

[68] Paragraph 7 repeats almost verbatim paragraph 4 and its

has suffered pain, injury, loss and damage.

Particulars of injury

Pain. Shock. Bruising. Further jarring to her back. Injury[70] to her ribs and left shin. As a result of the accident the Plaintiff was absent from work for four weeks[71], and[72] continues to experience stinging pains in her legs and shooting pains in her back, and to have difficulty sleeping comfortably, and still finds it painful to stand, sit, walk and especially[73] drive.

Particulars of special damage[74]

Please see attached schedule of special damage[75].

The Plaintiff will claim[76] interest on special damage[77] at the full[78] Court special account rate from time to time prevailing[79] from the date on which each item of loss or expense particularised in the said schedule of damage[80] was suffered or incurred[81], in the special circumstances[82] that the Plaintiff suffered those losses and expenses on those dates[83] and[84] they will be irrecoverable from the Defendant until the trial herein[85].

AND the Plaintiff claims:

(i) damages;

(ii) interest pursuant to section 69[86] County Courts Act 1984.

particulars. There are a few haphazard and inconsequential variations, and particular 4(e) (failure to warn) has been replaced by "failure to heed the previous accident".

[69] "These further matters" = "the second fall".

[70] This is too vague to be of use.

[71] This is not a particular of injury.

[72] Neither this nor the following "and" should be there. The different parts of this sentence (if particulars of injury) should have been separated into separate sub-paragraphs, as should (for consistency) "pain", "shock" and "bruising". The syntax of the sub-paragraphs should then be standardised, as the change from isolated words to a complete sentence jars. But nothing in this sentence (with the possible exception of the insomnia) belongs under this heading: these details are particulars of pain, if that is (as pleaded) a separate item.

[73] "Especially" tells the court that the driving pain is worse than the other pains, but it is too vague to be of use in assessing the damages.

[74] This appears to relate only to the second accident, though it must have been intended to relate to both.

[75] There is no point in referring the reader to a separate list, rather than including the information.

[76] This paragraph belongs immediately below, under "the Plaintiff claims". And why is this claim in the future whilst the main ones are present?

[77] Should this not be plural?

[78] The court usually awards half the special account rate on losses accruing over the period (for example, loss of earnings) rather than fiddle with trivial calculations of interest, taking the view that the outcome will be broadly the same. This drafter's approach will rarely be acceptable.

[79] "From time to time prevailing" is otiose.

[80] "Of loss or expense particularised in the said schedule of damage" could also be omitted without loss.

[81] "Loss or expense ... suffered or incurred" is a clumsy form of word-doubling that all but lawyers manage to avoid. If both pairs of words *are* essential, and cannot be replaced by alternatives which covers both, "loss suffered or expense incurred" is neater. In this case, the drafter was satisfied in the following line that both losses and expenses could be suffered.

[82] What is special about those circumstances? Is anything after "incurred" worth saying?

[83] These are hardly special circumstances.

[84] I would have been happier with a second "that", though it is not essential. It might have been better to split the two "special circumstances" into sub-paragraphs.

[85] What other trial but the one "herein"?

[86] "Of the" has been omitted.

A suggested redraft is offered on the next page.

Alternative particulars of claim

Parties

1. The defendant company employed the plaintiff to manage its stationery shop at unit 34, Byenow Shopping Precinct, Hammersmith, from January 1990 until February 1991.

2. The plaintiff was born on 13th October 1966, and is now aged 27.

The accidents

3. On 15th September 1990, and again on 6th December, the plaintiff fell down the stairs leading from the sales area to the storeroom.

4. The first accident occurred because the plaintiff caught her foot in the frayed carpet on the fifth step down, and she fell [how far?].

5. The second accident occurred because the plaintiff caught her foot in a tear in the carpet on the eighth step down, and she fell [how far?].

The defendant's liability

6. The accidents were caused by the defendant's:

   (a) negligent failure to inspect the carpet, warn the plaintiff of the defects, and maintain it to a reasonably safe standard;

   (b) breach of section 16(1) of the Office, Shops and Railway Premises Act 1963.

7. Each accident caused the plaintiff harm.

Particulars of harm (further details of which appear in the medical reports attached)

1st accident

(a) The plaintiff suffered shock. Her ribs and left shin were bruised and her back jarred. She was in pain for [?] weeks.

(b) She was unable to work for three weeks but suffered no financial loss.

2nd accident

(c) [Details of general damage]

(d) [Details of special damage]

Claim

And the Plaintiff claims:

(1) Damages.

(2) Interest under section 69 of the County Courts Act 1984.

1st March 1994

The editor is grateful to Charles Broadie and Stewart Graham for their advice on certain points of law and practice , but neither of them is responsible for any mistakes in the finished version.

So People Can Understand
»» continued from p.8

* A positive obligation on writers to comply with the law.
* Liability on writers for loss suffered by anyone due to a failure to comply.
* A remedy for non-compliance even without proof of consequent loss.
* A right for groups to seek a declaration that a document does not comply with the law, whether or not an individual person brings a complaint.
- It should provide adequate defences for good faith attempts to comply, and for use of language which is required by legislation.
- It should provide for a system of voluntary pre-approval of documents, using new and existing administrative agencies.

We hope to publish further extracts in future issues.

Letters

Editorial comment has been added in this typeface.

Legal jargon doctorate

Gwyn Winter

I was recently shown an article about CLARITY which appeared in *The Independent* last November. It was of particular interest to me since I am currently researching legal jargon at the University of Wales in Bangor with the specific aim of discovering the most effective way of simplifying the language of legal documents. I would like the opportunity to discuss your work with you, particularly your methods of simplification and their success in improving solicitor-client relations.

I believe that when simplifying legal language there are certain linguistic devices which it may be beneficial to retain in order to maintain the respect and confidence of the client, and that it is not simply a matter, for example, of substituting more commonly used vocabulary or simplifying clause structure. Furthermore, as you have evidently discovered, one often encounters resistance to simplification from individuals within the legal profession. The wide variety of resources that linguistics has to offer, in conjunction with the expertise and experience of lawyers themselves, may be able to offer a solution to these problems.

A number of broad questions present themselves:

- When is the use of jargon really necessary or justifiable?
- What are the underlying intentions of jargon users?
- How do the audience's perceptions match up to these intentions?
- What misunderstandings arise?

A small preliminary study indicated that the terminology of legal documents often prompts hostile and confused reactions in the recipients. Why is this? What are the salient features which render it unintelligible or confusing? How can we improve on the language used?

I shall be relating the use of jargon to Speech Accommodation Theory [1], language attitudes research, and pragmatics [2].

I am working in conjunction with Clement Jones, a local firm of solicitors, who have been more than generous in offering me some financial support as well as their time and the use of their facilities.

Gwyn Winter has since joined CLARITY, and would like to hear from members (especially linguists) willing to help. Her address is :

Bryn Cottages, Griffiths Crossing,
Caernarfon, Gwynedd LL55 1TU
Wales (Tel: 0248 670000)

Writing numbers

Dr Robert Eagleson

Bryan Garner has set out accurately the convention which many publishers follow on numbers (*Clarity* 29 (December 1993) p.14). But is it really the best practice to spell out numbers smaller than 101 as he suggests? Why do we have to persist with this convention at all? Numbers are numbers, after all; why cannot even the smaller ones be allowed to appear in their own glory, especially in printed text?

If we follow the convention, then we should write:

> During 1989, 102 trials consumed twenty days or more

but

> During 1989, ninety-two trials consumed twenty days or more.

The validity and value escape me, especially when the practice attracts several exceptions. It means that we are burdening writers with unnecessary rules and distracting them from the more important goal of achieving clarity.

I favour writing all numbers in their numerical rather than their alphabetic form unless the typeface we are using produces ambiguity, as used to happen to the first number and the twelth letter on the old typewriters. Printing numbers rather than spelling them helps readers grasp the message more readily.

[1] The theory that people other than lawyers naturally and without thinking about it accommodate their language and gestures to help the person to whom they are speaking understand.

[2] The study of the speaker's real meaning as opposed to the literal meaning of the words used.

Miscellany

Alan King

I would like to make the following comments on points made in the December issue of *Clarity*.

Common gender pronouns (p.7)

I strongly object to the use of "they", "them" and "their" for the common gender singular. It is just plain bad grammar, and takes sex-equality to a ridiculous degree. If the egalitarians cannot accept that, where the context admits, the male embraces the female, and if "he or she" is clumsy, then the sentence must be restructured, perhaps by repeating the noun or adjective, or using the plural throughout.

The worst examples I have found are

on the form for applying for arrears due to the estate of a deceased pensioner, e.g. "Where was the person staying when they died?". CLARITY has a member in the DSS; could they arrange for the form to be reworded?

In the review of Susan Krongold's article to which Mr King refers, Alison Plouviez quotes a passage which makes suggestions similar to those above. The singular "they", however, is not mentioned (or used).

I expect more members are irritated by the singular "they" (as I am) than would want to be associated with inegalitarians. But would it not be useful if "they" mutated into a singular pronoun? We need only get used to it as such. (As an example of the transience of any irritation Gowers quotes a 17th century letter from the Secretary to the Commissioners for Excise to the Supervisor of Pontefract:[1]

The Commissioners on perusal of your Diary observe that you make use of many affected phrases and incongruous words, such as "illegal procedure", "harmony", etc., all of which you use in a sense that the words do not bear. I am ordered to acquaint you that if you hereafter continue that affected and schoolboy way of writing, and to murder the language in such a manner, you will be discharged for a fool.)

I also suspect that Mr King's impatience with the sensitivities of women indicates that he has never been subjected to the niggling verbal slights of prejudice. I tend to snarl at people who ask me what my Christian name is; my reaction may be unreasonable, but the assumption annoys me and I thank people to accept that. Women object, no less reasonably, to the tradition that everyone outside the kitchen is a man.

John Roberts replies for the DSS on p.16.

Inheritance tax forms (p.8)

I fully agree with Geoffrey Bull's implied objection to providing, on official forms, extraneous information which takes a lot of time and effort to obtain, but which is rarely needed.

The small white boxes on page 1 of the Inland Revenue Account are badly placed. The box to be ticked by someone domiciled in England and Wales is nearer to the word "Scotland" than to "England and Wales". The word "Parent(s)" is nearer to the box for children than to the box for parents.

On page 2 of IHT 202 is a heading "Section 2A — Nominated and Joint Property - Without the Instalment Option". Why is this the only section with a number, and where should we show nominated property *with* the instalment option?

Paul Whyatt, customer services manager at the Capital Taxes Office, replies:

We welcome comments and suggestions about our forms and leaflets. Indeed, when the new Inland Revenue Accounts were in draft form we sought the views of our customers, solicitors and bank trustee companies. We took into account many of the helpful suggestions made by practitioners.

Mr King has written to ue about his concems and I reproduce below the text of our response.

One of our aims when we redesigned the Inland Revenue Accounts was to achieve consistency within and between them of both design and content as far as possible. As a result we alinged vertically the boxes on page 1. I do accept that errors might be less likely if the printing and box were closer together. We will bear this in mind when the Account is due for reprinting.

Unfortunately the first print run of IHT 202 (1993) was flawed in a way that led directly to the confusion you mentioned. A new version was printed to remedy the deficiency.

If any of your readers have any comments about any other Inheritance Tax form I shall be pleased to hear from them.

Writing numbers (p.14)

It is surely safer and wiser to write all important numbers (such as the amounts of legacies in a will) in words, as a digit can easily be added, omitted, or typed wrongly. As an added safeguard, numerals can be used as well.

Many members would disagree. Mistakes are less likely, and more likely to be noticed in time, if the client is presented with a readable document to check before signature.

In addition to the five exceptions given in the article, I would like to suggest two more — that serial numbers (e.g. "page 3"), and numbers involving fractions (e.g. "5¾ miles away"), should be in numerals.

It should also be remembered that "one sixth" should be written "1/6" and not "1/6th" (just as "three quarters" is written "3/4" and not "3/4trs"). And that "4.12p" means "four pence and twelve hundredths of a penny"; "Four pounds twelve pence" is written "£4.12".

Finally - Dying before me

We often see in wills clauses such as "I give my barometer to my son John but if he dies before me to his wife Mary." I think that is incorrect grammatically, but I have had difficulty in convincing others, even colleagues who pride themselves in *["on"?]* their English. If John dies before me, he drops dead in front of me, in my presence. The will should say something like "if he dies before I do". "Me" is the object *["I am", surely, to a purist?]* (accusative) pronoun, but its function in the sentence is as the subject (nominative) of the unstated " do". Compare "Hit the ball after me", which means "Hit the ball after you hit me", and "Hit the ball after I hit the ball", which means just that. Are there any grammarian readers who agree with me? Would translating the clause into another language help us discover the correct English?

[1] The Complete Plain Words (3rd edition, revised by Sidney Greenbaum and Janet Whitcut); p.24 of the 1987 Penguin edition.

"Hit the ball after me" is technically, but not in practice, ambiguous, but it is not ungrammatical. "After" requires the accusative just as "between" does, and the verb "do" is not needed. Without the verb, we say "after me"; with it, it is the phrase "I do" which is the object, and "I" is needed only because the pronoun becomes the subject within the object phrase. I do not think I have explained that very well. Can any grammarians comment?

He or she

John Roberts
Documents Design
Information Services Branch
Benefits Agency
Department of Social Security

The lack in English of a singular pronoun to mean "he or she" has plagued us for centuries, giving rise to awkwardness such as:

- "he or she"
- "he/she"
- "(s)he" or "s(he)"
- "he" to embrace both sexes.

The first, while acceptable, becomes tedious when repeated often, as in a Benefits Agency claim form. The middle examples are clumsy and have no equivalent in spoken English. The final example can only be regarded as a last resort and angers feminists.

Obviously, if a communication can be personalised we would use "he" "she" or "him" "her" as appropriate.

This is not always possible and Document Design use "they" and "them" as singular pronouns in the documents provided for the Benefits Agency. The issue has nothing to do with sex equality; it simply avoids the alternative constructions I have already criticised. Nor is it bad grammar. I have collected examples of such usage going back to the 15th century. One of my favourites is from the pen of the Restoration poet Sir Charles Sedley:

As freely as we met, we'll part,

Each one possest of their own heart.

Purists may disagree, but I think those are magical lines.

The *Oxford English Dictionary* does not condemn such usage; the "they" entry has "Often used in relation to a singular noun". I have also noticed that style guidance produced over the last few years by (for example) *The Times* and the Metropolitan Police has encouraged the usage. The latter has "all officers must do their best".

The contemporary *Good English Usage*, compiled and written by Godfrey Howard, says "We can wear ourselves and our readers out writing "he or she" all the time". Writers see the way ahead using "they", "them", "their" as unisex words. Bernard Shaw remarked "Nobody would ever marry if they thought it over".

Shooting from the lip

Professor Peter Butt
University of Sydney

I have for many years marvelled at the way lawyers use ordinary English words in a way that ordinary English users do not. For example, *demise* ("I didn't even know the premises were sick"), *devise, determine, presents, style,* and *suffer.*

Judges are not free from this linguistic eccentricity. Recently I came across the following statement by a judge in a conveyancing case: "Whilst present at the execution he ought to have made some enquiry of the marksman". Was this a description of events at a firing squad? No, the judge was explaining that a mortgagee should have asked a mortgagor whether he understood the document to which he was putting his mark.

Legislative drafting format

Sir Kenneth Keith
New Zealand Law Commission

I am pleased to enclose a copy of the Law Commission's latest report, *The Format of Legislation* (NZLC R27) which the Minister of Justice tabled in Parliament on 22 December 1993. Extracts appear on the following pages.

The report is one of the Commission's responses to its responsibility under the *Law Commission Act 1985* and a broad Ministerial reference to advise on ways in which the law can be made as understandable and accessible as possible. The letter of transmittal and the report (in paras 6, 7 and 9 and appendix E) mention other relevant steps. The *Second Report of the Working Party on the Rorganisation of the Income Tax Act 1976* (September 1993, AJHR B31) gives important indications of the advantages that can be obtained from changes in format.

The Commission recommends changes to the design and typography of legislation and presents a full statute, the *Defamation Act 1992,* in the proposed new format, shown alongside the Act in the present style.

Good, functional design facilitates access to legislation. It saves the time of those preparing and considering legislation and of those who later use it. It saves money. As the report indicates, those advantages are increasingly being appreciated in New Zealand and overseas.

The Law Commission trusts that the proposed design will be widely supported by those who prepare and use legislation. We have had wide support from those we consulted in preparing this report, and later from those consulted on the reorganised *Income Tax Act.*

In particular, it looks forward to your support for the adoption of the proposal.

Extracts from

The format of legislation

New Zealand Law Commission Report NZLC R27

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Introduction

1. In order to improve access [to statutes], the Commission recommends in this report changes to one aspect of legislation: its physical appearance arising from design and typography (see pages 22 and 23).

2. Good, functional typography and design are invisible. Good design allows readers to concentrate their energy on substance rather than be distracted by format. Good design can also facilitate the very drafting of legislation because it can make the task more logical. The nature of the message will of course influence the appearance of text: the design must be appropriate to the substance, and to the reader. But a bad design remains a bad design, even though it may be redeemed to some extent by familiarity.

3. Understanding of even the best drafted law may be hindered or helped by such factors as the typeface, type size, leading (the space between the lines of type), the length of the line, the layout and ordering of provisions, the use of headings, the indentation of the text, the placing and content of notes in the text, and the use of aids such as indexes, examples or flow charts. Even the size of the page and the feel, weight and tinting of the paper are important. Communication experts agree that a page which is well designed is not only more attractive but also aids understanding.

4. The Law Commission has concluded that improvements to the design of New Zealand legislation can help make it more accessible and more easily understood.

5. It must be beneficial if Members of Parliament spend more time dealing with policy questions than trying to ascertain the meaning of the proposals put before them; if lawyers can more readily find the law and so advise their clients; and if the public can more easily determine the rules which govern their personal or business transactions. In some contexts the financial savings have been quantified: they can be significant, and they continue to grow. For example, between 1982 and 1990 the British Government is said to have saved some £15 million by redesigning some of its forms.

6. We cannot have a moral obligation to obey a law which is actually withheld or kept secret from us. But availability is not sufficient: those who are expected to know, obey, apply and advise on the law must be helped so far as is practicable to understand it.

7. That understanding can be enhanced in a number of ways, with improvements to both the substance and the appearance of the text. This report considers the latter, and proposes a new format for enactments. As well, the Law Commission continues to support clearer and more straightforward legislative drafting: shorter sentences, use of the active voice, use of everyday language. It recognises the efforts of Parliamentary Counsel in this direction, often under difficult conditions. Clearer drafting need not be at the expense of precision and certainty: indeed, a plainer drafting style may reveal anomalies.

8. Clearer drafting is of course helped by the clear statement of the relevant policies and instructions.

9. Standard rules for drafting commmon provisions not only speed the drafting process and reduce the chance that issues will fail to be addressed, but make legislation easier to use. Certain structures become familiar; readers know where in an Act particular provisions are likely to be found; and the meaning and application of standard provisions will become more commonly known. Time is saved and dispute is less likely. These matters are being considered by the Law Commission in its preparation of the *Legislation Manual for New Zealand.*

Format and design

11. Setting out sections so that the divisions between section, subsection, paragraph and subparagraph are clear allows the eye to pick out each level by simply glancing at the page. Notes, relevant dates, tables of contents, flow charts, indexes, and running heads may also help the reader find the provisions sought. The aim of the Commission throughout has been to consider the users. Aesthetics were a secondary consideration, but better design results in a more attractive page as well.

The process of improvement

12. A comparison of early New Zealand statutes with those of today shows that, over time, substantial change has been effected. The New Zealand "look" in statutes dates back to the 1908 Consolidated Statutes; but since

then improvements have been incremental: some unnecessary punctuation gradually omitted, arabic numbers used rather than words, the enacting clause simplified. (Chan has usefully described this process in *Changes in form of New Zealand statutes* (1975-1977 8 VUWLR 318.)

13. The Law Commission has been experimenting for some time with the design of the draft Acts contained in its reports. For the purposes of this report it engaged consultants with experience in the field of design and typography to advise on how that earlier work could be extended and improved.

14. The Commission has drawn ideas from a broad range of other sources: aspects of current statute design in several jurisdictions; legislation produced by commercial publishers; the writing of specialists and the growing literature on plain statutory drafting. It has consulted and received comments on its draft proposals from a variety of those of prepare and use legislation. The responses have been almost without exception supportive and often enthusiastic. The Commission incorporated many valuable suggestions. The Clerk of the House pointed out that it is important that there be a consistent style. However, it will be sensible in some cases that consistency gives way to practicality, particularly in the case of schedules to Acts, which vary widely in content. It may be appropriate here to paraphrase George Orwell's famous dictum from his essay *Politics and the English Language:* "Break any of these rules sooner than [do] anything outright barbarous."

Costs and benefits

15. Most of the benefits are of course of a continuing character, and of advantage to all subsequent users. But the costs are mainly one-off.

16. The Commission had some initial concern that the proposed changes might raise the cost of legislation: first, because the proposals might increase the length (and so the printing cost) of enactments, and, secondly, because preparation would be more time-consuming. There is some foundation to the first concern, since the sample prepared for this report shows a small increase in length from the current format - 32 pages as compared with 30. But the benefits would outweigh any modest increase in printing costs, which in this particular sample amounts to approximately 7%. The inclusion of more notes to sections, for instance, or allowing for more white space on the page, greatly enhance both the usefulness and the accessibility of the proposed format.

17. The increase in length is kept to a minimum because of the size of the typeface used in the main text, which allows more words to appear in each line — but not at the expense of clarity. The type size is smaller than that presently used in the statutes, but the same as that in the statutory regulations series and the fourth edition of *Halsbury's Statutes.* These publications (and many textbooks also) attest to the fact that the smaller type size is acceptable in a wide range of uses. And the samples conform to the results of empirical research on line width, leading and type size for optimal legibility. Some of the other proposed drafting changes are also helpful in minimising length. For example, omitting "of this section", "of this Part" and "of this Act", where the reference is unnecessary (as it nearly always is), gives an estimated saving of one line on every page or about two pages in every hundred.

18. In relation to the second matter, the preparation of legislation, any extra costs should be more than offset by the improvements. Most of the proposals merely require changes to present typesetting practice; that is, of the codes which set up the specific format. After a transitional period the typesetter's job will not alter. The government's printer has confirmed that any increase in the cost of printing legislation would relate only to a possible increase in the number of pages, if the new format were adopted. Some of the proposed changes would affect the drafting of enactments, but the difference in preparation time appears to be either minimal — such as between drafting a purpose section and a long title — or even reduced — such as where the references to "this Act" or "this section" are omitted. Others are more time-consuming: for example, the proposals relating to notes to sections. But the benefits both to the reader and the drafter (to whom the notes are useful as a reference point) outweigh this. And if extra information of the kind mentioned in paras 25 - 29 is to be included at all, the best time to do it is when the information is freshly available as a result of the policy formation and drafting process. Once again, the costs are one-off, the savings cumulative.

A new format

Choice of sample statute

19. The substance of each statute dictates its form to a large extent; and although most statutes may contain standard features — such as a long title and an interpretation provision — they differ markedly from each other. The consequence is that it is not possible to find a sample statute for redesign which covers all eventualities. For this reason, the statute which has been selected to illustrate the proposed format, the *Defamation Act 1992,* must be considered as indicative only. This proviso applies particularly to the schedules, amongst which there tends to be the widest variation from statute to statute.

20. The *Defamation Act* provides a

particularly suitable sample.

- We considered it desirable to reproduce a whole Act, for two reasons: to facilitate an accurate cost comparison, and to create maximum impact and authoritativeness. The Defamation Act is of modest length (30 pages) and yet it contains most of the features which require illustration in a redesigned format. These include multiple Parts; schedules; cross headings; an extensive interpretation section; complex provisions divided into paragraphs and subparagraphs; and references to origins which can be incorporated into notes.

- It is relatively unamended, which means that it is not complicated by matters which it is inappropriate to address in this report.

- It is drafted in a contemporary style, using gender-neutral language. This means that there will be minimal incompatibility between language and format in the redesigned version.

The two formats compared

21. The Commission proposes that Acts and subordinate legislation should be laid out in the same way. Uniformity and consistency aid understanding. The traditional justification for the different styles — that the material in schedules and regulations is of less significance than the provisions in the body of an Act — does not appear to be valid. In practical terms, the rules and procedures in those schedules and regulations may have greater day-to-day application than other provisions in the body of the Act. In some contexts a clear distinction between important and less important material can be marked by different type sizes: for example, in the notes to sections.

22. Some small changes have been made to the language of the enactments, but these are limited to the enacting formula and the substitution of a purpose provision for the short title, as well as deletion of unnecessary references to "of this Act" etc. No attempt has been made to substantially restructure or redraft the Act, something which is outside the scope of this report.

Typeface

24. The Law Commission proposes a change in typeface from the Baskerville presently used to Bembo. Because it is a relatively condensed face Bembo makes efficient use of space. Its long ascenders ensure that it is legibile and pleasing to the eye even with minimum leading. Baskerville's wide characters take up more space and require a correspondingly greater number of pages. In the current format its setting is overly large and, perhaps to save space, insufficiently leaded: the ascenders and descenders often overlap, and this is confusing to the reader.

Title and purpose section

25. The long title has been omitted entirely on the basis that it no longer serves any useful function. Acts are invariably referred to by their short title, and the remaining function of the long title appears to be to explain the general purposes of the Act.

26. The short title should be included in the enacting formula. To achieve the "purpose" function, the Commission proposes that principal Acts should include a separate purpose section as the first provision in the Act. It has followed this practice in the draft Acts included in its own reports, building on developing experience in existing legislation (see *Official Information Act 1982; Sale of Liquor Act 1989; Ozone Layer Protection Act 1990; Historic Places Act 1993*).

27. Purpose provisions will not be needed in all Acts. In particular, amending Acts might not generally include them, although in some instances they can be helpful, say in indicating a set of related changes to a number of Acts or a major change in a principal statute. The guiding principal is that a purpose section should be included only if it will be genuinely helpful. It should not be a "manifesto", but should facilitate parliamentary debate and add something to the body of the Act.

Definitions section

28. Most interpretation sections consist exclusively of a series of definitions, and for this reason the new format includes a specific definitions section. True interpretation provisions would, if necessary, be included in a separate section headed "Interpretation". In general, the definitions should be collected in one section. However, if a defined word or phrase is confined to one section, then the definition should be included in that section; and, if appropriate, a footnote to the principal definitions section could refer the reader to sections which feature their own definitions. The location of the definitions sections will vary, depending on the content and the extent of the Act.

29. In the proposed new definitions section itself, each word defined is highlighted, not by an initial capital and by being enclosed in inverted commas, but by being printed in bold type. Each definition is clearly separated from the others by increasing the space between the lines.

Notes to sections

30. The Commission has proposed that notes about the "administration" of Acts should in general be discarded, because they can soon become outdated and may be misleading (report 17, para 96). That information can be provided

in more up-to-date and convenient ways, for example in departmental publications or the Official Yearbook.

31. Notes have also been added to sections in the sample statute referring the reader to the words used in that section which are defined elsewhere in the Act or in the Acts Interpretation Act 1924. That seems the least obtrusive way of alerting the reader to the fact that some words are specifically defined. Even if that practice increases the drafting time, it should help drafters. Consider the practice of beginning definition provisions with the words "In this Act, unless the context otherwise requires...". A drafter going through a draft Bill before introduction to note the defined words in each clause (a process facilitated by the search function of new technology) will be able to check whether the word is used anywhere in the draft in a sense different from its definition. If it is, the drafter can change the word or make other appropriate adjustments. In either case, the effect will be an increase in certainty for those using the Act.

32. The sample statute also features internal cross-references, which refer the reader in this case from defences and remedies to procedure, and vice versa. But the potential for notes is even greater. While the text of the Act should certainly not be lost in a rash of textual aids, if a note is helpful there is no reason why it should not appear in an Act from its inception.

33. Cross-references to other Acts, to cases, or to reports of law reform or other relvant bodies on which legislation is based (possibly presented as a table) might all be useful. And sometimes material from the explanatory notes which usually accompany Bills might usefully be included in notes to the Act. Such material is of course commonly included in commmercial publications of legislation and was included in *The Public Acts of New Zealand (Reprint) 1908-1931.* The Commission therefore agrees with the view of four members of the Renton Committee that "users of the Act should also have the opportunity of seeing whether such explanatory notes would be of assistance to them". Certainly, even if this practice were not adopted, explanatory memoranda could be expanded and made more useful (see further para 35).

34. The objection that the practice of including notes to clauses would adversely affect the legislative process by lengthening debate is not borne out by the experience with the explanatory notes to Bills, which have long been available to Members of Parliament.

35. In addition, the proposed practice would not have any effect on the interpretation of statutes. Whether or not extra material appears on the page is not the issue: the notes printed in the reprinted statutes published under the authority of the Government of New Zealand do not appear to have caused difficulty. Nor do the notes included in regulations: each finishes with an explanatory note which is stated to be "not part of the regulations, but is intended to indicate their general effect". What is important is the significance (if any) to be given to such material, whether it appears in the printed text of the Act or not. And that is a matter for the courts, which will no doubt discount material which is not useful, as they do already.

Schedules

36. The information presented in schedules can be of equal or even greater importance to the user than that in the body of the Act. The schedules should therefore generally be printed in the same type size, with similar highlighting. Because of the great variation in the substance of schedules, the following comments on the changes brought about by the new format are restricted to those in the sample statute:

- Part 3 of Schedule 1 (Interpretation) has become Definitions, to be consistent with s.2.
- In Schedule 2, which lists consequential amendments, the information has been streamlined so that the essential elements are easier to find. Thus it is reduced to the name of the Act, its number, the relevant provisions, and a statement of the changes effected, with the nature of the change summarised in bold type (Repeal, Delete, Substitute).
- Schedule 3, which lists repeals, is likewise reduced to the name of the Act, its number, and the provision(s), Part(s) or schedule(s) repealed.

Miscellaneous changes

37. The following is a list of changes which require minimal or no discussion:

- the number, year, and dates of assent and commencement are clearly shown on the title page of the Act directly beneath a more prominent title;
- the contents pages are headed as "Contents" in conformity with ordinary usage, and not "Analysis"; but they continue to appear in double-column format becaise the proposed changes in typography provide a sufficient increase in clarity;
- the body of the Act begins with a prominent enacting provision;
- a Preliminary Part has been created - comprising preliminary provisions such as purpose, definitions and application - for the reason that preliminary provisions are not outside the Act and should be included in a numbered Part;
- the section headings are raised above the section text to make them more conspicuous;
- section numbers and Part headings have been added to the

running head at the top of the page to make it easier to find the relevant section or Part;

- references to other enactments are italicised so that they stand out in the text;
- the punctuation has been modified in order to make it more consistent with ordinary usage: for example, each definition in the definitions section is concluded by a semi-colon, rather than a colon; and in paragraphed sections dashes are omitted where a line break performs the same function of separating the paragraphs and subparagraphs;
- a brief summary of the Act's legislative history appears at the very end: it includes dates and references to Hansard as well as to any relevant law reform publications, and could also refer if necessary to an Act's origin in a treaty.

Other legislative documents

Amending Acts

38. The structure of amending Acts is not directly addressed in this report, but some brief suggestions follow. The amending provisions could be removed from the main body of the Act and set out in tabular form in a schedule to the Act. Placing the amendments in schedules allows more direct instructions to be given than is appropriate in the body of an Act. The body of the Act would then contain only a purpose provision, commencement and transitional provisions, and the amending provision which simply provides that the principal Act is amended as set out in the schedule. This format seems neater, clearer and more economical than the present practice. A variety of ideas from Canadian and Australian legislation could also be adopted. For example, if several enactments are to be amended, each Act might sometimes be dealt with in a different schedule, or a list of the affected enactments could be set out in the table of contents. In other cases amendements to several Acts but relating to a single topic might usefully be included in a single schedule or provision.

39. A related matter is the use of more direct standard formulas for inserting or deleting words, or making other amendments. The standard formulas must be compatible with any requirements for computerised annotation of an electronic database of New Zealand enactments.

Bills

40. Some of the Commission's recommendations will also require changes to Bills. They should be printed in the Bembo typeface and set out in the new format. But, in general, those existing features peculiar to Bills work very well as aids during the legislative process and should remain. Such features are the much larger margin (because Bills are printed on an A4 page rather than the 240 x 150 mm page size used for Acts); the numbering of lines; and printing references to other provisions in bold type. Certainly, the practice of marking changes in the text, when the Bill is reported back from Select Committee or amended in the Committee of the Whole, is excellent. The changes during the passage of a Bill to its table of contents should also be indicated. Some Bills as reported back are accompanied by written reports explaining the amendments. Amendments introduced by Supplementary Order Paper also usually have explanatory notes. It would be very useful if these practices applied generally.

41. Other improvements can be made, notably in clarifying the history of a Bill and identifying the stage it is at in the legislative process.

42. Explanatory notes could be made more useful than at present. Many notes now do no more than paraphrase the Bill's clauses rather than explain their purpose and effect.

Other aids to understanding

The use of devices to aid comprehension can be taken further than the changes recommended in this report. Other steps which would be useful in particular Acts include the following:

- The construction of flow charts. These are particularly effective in explaining complicated procedural matters; in showing the interrelationships between different elements in a statute; in answering specific questions, especially those which relate to entitlements and liabilities; in reducing the amount of information which a user must remember at any one time; and in giving a quick overview of a statute.
- The use of formulas, pictures, maps or diagrams (instead of words) if that is the most straightforward way to explain a concept. This is occuring to some extent already: consider the formulas used for calculations in tax Acts and the (colour) representation of the New Zealand flag in the *Flags, Emblems, and Names Protection Act 1981*. A great deal more use could be made of such devices. One example of a failure to do so is the Schedule to the *Auckland Harbour Edge Bill* introduced in 1989: it describes in words part of the city of Auckland, but it would be more helpful to refer the reader as well to a map.
- Examples explaining the oper-

ation of the Act's provisions (pioneered in the *Indian Evidence Act 1872*; see also the *Consumer Credit Act 1974* [UK], Schedule 2).

- A more direct statement of penalties than in the present substantive provisions. For example, if a fine is a penalty for an offence the provision creating the offence might finish with the words "Maximum penalty: $X". The *Summary Proceedings Act 1957* could be amended to provide that this form of words

The existing Act

1992, No. 105

An Act to amend the law relating to defamation and other malicious falsehoods [*26 November 1992*

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title and commencement—(1) This Act may be cited as the Defamation Act 1992.

(2) This Act shall come into force on the 1st day of February 1993.

2. Interpretation—(1) In this Act, unless the context otherwise requires,—

"Broadcaster" has the meaning given to it by section 2 of the Broadcasting Act 1989:

"Defamation" includes libel and slander:

"Distributor" includes—

(a) A bookseller; and

(b) A librarian:

"Judge", in Parts II, III, and IV of this Act, means,—

(a) In the case of any proceedings before the High Court, a Judge of that Court:

(b) In the case of any proceedings before a District Court, a Judge of that Court:

"News medium" means a medium for the dissemination, to the public or to a section of the public, of news, or observations on news, or advertisements:

"Newspaper" means a paper—

(a) Containing news or observations on news; or

(b) Consisting wholly or mainly of advertisements—

that is published, in New Zealand or elsewhere, periodically at intervals not exceeding 3 months:

"Processor" means a person who prints or reproduces, or plays a role in printing or reproducing, any matter:

"Working day" means any day of the week other than—

provide that this form of words indicates the maximum fine for anyone convicted of the offence. This form is used in some Australian jurisidictions and has several advantages: it stands out more clearly on the page, is much simpler to draft, and facilitates the review of penalties. It may also encourage more direct drafting of the provisions *creating* offences.

- Indexes to long or complicated statutes (see, for example, New

The redrafted Act

The Parliament of New Zealand enacts the Defamation Act 1992

PART 1
PRELIMINARY

1 Purpose
The purpose of this Act is to amend the law relating to defamation and other malicious falsehoods.

1A Commencement
This Act comes into force on 1 February 1993.

2 Definitions
(1) In this Act, unless the context otherwise requires,

broadcaster has the meaning given to it by section 2 of the *Broadcasting Act 1989*;

defamation includes libel and slander;

The value of usability testing in document design

by Anita D. Wright
Document Design Centre, American Institutes for Research, Washington DC

Based on a presentation for the March 1994 Conference on College Composition and Communication

Good technical writing is forgettable. It's not read for pleasure and hardly ever discussed at cocktail parties. People read technical documents only when they need to perform a specific task or research a problem. Whether filing an insurance claim, trying to understand a lease, or using a manual to instal a computer, people need information presented clearly, precisely, and in the first place they look. They judge a document's usability by how quickly it helps them complete the task or solve the problem. If the document does the job well, people forget about it. If not, people complain.

No one ever intentionally writes a bad manual or designs a bad form. So, when people complain about bad documents, the writers are usually surprised. After all, they understood it. The writers, however, are often subject-matter experts who understand the product, the process, and the terminology. First-time or infrequent users don't have this knowledge and, consequently, find documents confusing.

Writers also seldom have direct contact with users, relying instead on information from their companies' sales, marketing, or training departments about users' needs and expectations[1]. Not only is this information filtered by others, but it is often not at the detailed or procedural level that writers need in order to help users with their tasks.

How can writers ensure that people they have never met will be able to understand and easily use a document that is still being developed? The best way to find out if the document works is by watching people use it, seeing what problems they have, and fixing those problems ***before*** the document is published. Yet writers, and the companies they work for, often balk at conducting usability tests, seeing it as an expensive frill. Although it can be expensive, it doesn't have to be, and it's never a frill.

This article will explain why usability tests are not only cost-effective but simply good business. It will also describe the usability tests that the Document Design Center conducted while redesigning a form for the US Internal Revenue Service and explain how the results of those tests guided the form's redesign. ("Before" and" after" versions appear on the next double page.) Although the article focuses on a form, the benefits of usability testing apply to ***any*** document, including such legal documents as contracts, insurance policies, and legislation.

Why usability tests are important

Usability testing is most often thought of as a method to help manufacturers identify problems in a product before it goes into production, often saving a company from marketing a product that is doomed to failure. In the same way, such testing can identify problems in documents, either in a new or redesigned document before it is published or in an existing document to better focus the redesign.

Any product that goes on the market with problems is expensive. In addition to the hardware and worker-hours needed to correct the defects, the poor customer relations that result must be repaired. Poor documents are no different. Although usability tests admittedly take time and money, the benefits far outweigh the costs. In fact, usability testing is cost-effective for three reasons.

- Testing helps writers work efficiently by
  - identifying the real problems, rather than the perceived problems, of any document;
  - pointing out the magnitude of each problem, allowing writers to make changes that have the most impact; and
  - showing writers possible ways of solving these problems.

[1] *Online Help: Design and Evaluation*; Duffy, Mehlenacher, and Palmer; Ablex Publishing Corporation, Norwood, NJ; 1992

A Practical Guide to Usability Testing; Dumas and Redish; Ablex Publishing Corporation, Norwood, NJ; 1993

- Testing ensures that the final document meets the needs of the intended audience ***before*** it goes to print.

- Testing provides measurable proof that the final document works, saving expensive patching and rewriting later on.

Finally, the first rule of writing is to know your audience. What better way than to watch them use the document and talk to them about any problems they have? Such first-hand information is much more reliable and enlightening than any observations from the sales force, and more timely, too.

How to conduct a usability test

Although usability tests can be an expensive operation involving a sophisticated laboratory with two-way mirrors, video cameras, and paid participants, they can also be done less expensively and still provide valuable information. The primary requirements for any usability test are simply that

- the participants reflect actual users,

- the participants perform real tasks, and

- each test be conducted the same way.

Although many methods exist for testing documents, two of the best are the think-aloud protocol and the structured interview.

The think-aloud protocol

In the think-aloud protocol, an observer tests each participant individually and records the participant's behavior and comments. The participant is given one or more tasks to perform using the document, such as filling out a form, looking up information in a manual, or setting up an answering machine and recording a message.

Throughout the task, participants are asked to think out loud, which provides information not only on *what* they do, but *why* — the thought processes that lead to their actions, the terms they find confusing, the instructions that are inadequate or misleading. In addition to recording comments and behavior, the observer prompts participants to speak whenever they fall silent and queries them about any difficulties to help pinpoint problems that they have trouble articulating.

Whenever possible, writers should conduct the test in the participants' own surroundings. Doing so helps writers to best see the steps, both literally and figuratively, that participants must take to perform the task and helps identify any constraints. For example, a form designed on large paper or a manual that refers people to a larger manual might be quite usable for someone working in an office but not for someone working outdoors using a clipboard.

The structured interview

In structured interviews, each participant is asked the same questions about the document. This method is quite valuable for determining whether people understand the language used. For example, by asking participants to define terms or explain a phrase in their own words, writers can find out whether users are interpreting the document correctly and whether important information is being overlooked.

The structured interview works well in tandem with the think-aloud protocol to ensure that all potential problems have been identified. For example, if participants are able to perform the task correctly, the think-aloud protocol might not catch the fact that they misunderstood a term. By using a structured interview after the think-aloud protocol to ask participants to explain the meaning of words or phrases, writers can be

When to conduct a usability test

Writers must resist the temptation to complete an entire document and *then* test it to confirm their belief that it works well. As Dumas and Redish point out in *A Practical Guide to Usability Testing*, "Usability testing is best used ***early and often,*** not once at the end when it is too late to make changes."

Technical writing should be an iterative process in which sections of the document are drafted, tested, revised, and retested. Building testing into the process uncovers potential problems early. Retesting is critical because solving one problem often creates another. For the document to be effective, ***all*** problems must be identified and corrected.

Testing early and often is essential and need not be expensive. For early drafts, writers can ask any typical user — a colleague, a friend, a family member — to test the document and provide feedback before the document is too far along. Again, the important criteria are that these participants represent actual users, that they perform real tasks, and that each test be conducted the same way.

To illustrate the benefits of usability testing, the rest of this article describes a project in which the Document Design Center (DDC), in conjunction with the US Bureau of Labor Statistics and Westat, Inc., evaluated and redesigned a form for the US Internal Revenue Service. In this project, usability testing uncovered serious problems with the existing form. DDC then used the results of that testing to guide the form's redesign, creating a form which tested significantly better than the original.

Testing a form for the Internal Revenue Service

The US Internal Revenue Service (IRS) asked DDC to redesign its

The original form

Form **2119**

Department of the Treasury
Internal Revenue Service

Sale of Your Home

▶ **Attach to Form 1040 for year of sale.**

▶ **See separate instructions.** ▶ **Please print or type.**

OMB No. 1545-0072

1991

Attachment Sequence No. **20**

Your first name and initial. (If joint return, also give spouse's name and initial.)	Last name	Your social security number
		: :

Fill in Your Address Only If You Are Filing This Form by Itself and Not With Your Tax Return	Present address (no., street, and apt. no., rural route, or P.O. box no. if mail is not delivered to street address)	Spouse's social security number
		: :
	City, town or post office, state, and ZIP code	

Caution: *If the home sold was financed (in whole or part) from a mortgage credit certificate or the proceeds of a tax-exempt qualified mortgage bond, you may owe additional tax. Get* **Form 8828,** *Recapture of Federal Mortgage Subsidy, for details.*

Part I General Information

1a	Date your former main home was sold (month, day, year) ▶	1a	/ /
b	Face amount of any mortgage, note (e.g., second trust), or other financial instrument on which you will get periodic payments of principal or interest from this sale (see instructions)	1b	
2	Have you bought or built a new main home?		☐ Yes ☐ No
3	Is or was any part of either main home rented out or used for business? (If "Yes," see instructions.)		☐ Yes ☐ No

Part II Gain on Sale (Do not include amounts you deduct as moving expenses.)

4	Selling price of home. (Do not include personal property items that you sold with your home.)	4	
5	Expense of sale. (Include sales commissions, advertising, legal, etc.)	5	
6	Amount realized. Subtract line 5 from line 4	6	
7	Basis of home sold (see instructions)	7	
8a	**Gain on sale.** Subtract line 7 from line 6	8a	

- If line 8a is zero or less, stop here and attach this form to your return.
- If line 2 is "Yes," you **must** go to Part III or Part IV, whichever applies. Otherwise, go to line 8b.

b If you haven't replaced your home, do you plan to do so within the replacement period (see instructions)? ☐ Yes ☐ No
- If "Yes," stop here, attach this form to your return, and see **Additional Filing Requirements** in the instructions.
- If "No," you **must** go to Part III or Part IV, whichever applies.

Part III One-Time Exclusion of Gain for People Age 55 or Older (If you are not taking the exclusion, go to Part IV now.)

9a	Who was age 55 or older on date of sale?		☐ You ☐ Your spouse ☐ Both of you
b	Did the person who was age 55 or older own and use the property as his or her main home for a total of at least 3 years (except for short absences) of the 5-year period before the sale? (If "No," go to Part IV now.)		☐ Yes ☐ No
c	**If line 9b is "Yes," do you elect to take the one-time exclusion?** (If "No," go to Part IV now.)		☐ Yes ☐ No
d	At time of sale, who owned the home?		☐ You ☐ Your spouse ☐ Both of you
e	Social security number of spouse at time of sale if you had a different spouse from the one above at time of sale. (If you were not married at time of sale, enter "None.") ▶	9e	: :
f	**Exclusion.** Enter the **smaller** of line 8a or $125,000 ($62,500, if married filing separate return)	9f	

Part IV Adjusted Sales Price, Taxable Gain, and Adjusted Basis of New Home

10	Subtract line 9f from line 8a	10	

- If line 10 is zero, stop here and attach this form to your return.
- If line 2 is "Yes," go to line 11 now.
- If you are reporting this sale on the installment method, stop here and see the line 1b instructions.
- All others, stop here and **enter the amount from line 10 on Schedule D, line 2 or line 9.**

11	Fixing-up expenses (see instructions for time limits)	11	
12	**Adjusted sales price.** Subtract line 11 from line 6	12	
13a	Date you moved into new home (month, day, year) ▶ / / b Cost of new home	13b	
14a	Add line 9f and line 13b	14a	
b	Subtract line 14a from line 12. If the result is zero or less, enter -0-	14b	
c	**Taxable gain.** Enter the **smaller** of line 10 or line 14b	14c	

- If line 14c is zero, go to line 15 and attach this form to your return.
- If you are reporting this sale on the installment method, see the line 1b instructions and go to line 15.
- All others, **enter the amount from line 14c on Schedule D, line 2 or line 9,** and go to line 15.

15	Postponed gain. Subtract line 14c from line 10	15	
16	**Adjusted basis of new home.** Subtract line 15 from line 13b	16	

Sign Here Only If You Are Filing This Form by Itself and Not With Your Tax Return	Under penalties of perjury, I declare that I have examined this form, including attachments, and to the best of my knowledge and belief, it is true, correct, and complete.
	Your signature ▶ Date — Spouse's signature ▶ Date
	(If a joint return, both must sign.)

For Paperwork Reduction Act Notice, see separate instructions. Cat. No. 11710J Form **2119** (1991)

*U.S. Government Printing Office: 1991 — 285-286

The first page of the two-page revised form

Form **2119**

Department of the Treasury - Internal Revenue Service

Sale of Your Home

1993

OMB No. 1545-0072
Attachment Sequence No. 20

Read this first

- Read the instructions before you begin. They'll tell you where to get the information to fill out this form and whether you need to file any other forms.
- Print or type all information.

Give us information about yourself

If you are filing this form with your tax return, you can skip the address lines.

1. Your first name, middle initial, last name
2. Your Social Security number — —
3. If you are filing jointly, your spouse's first name, middle initial, last name
4. Spouse's Social Security number — —
5. Your current mailing address (street, apartment, rural route, or P.O. box)
6. City, state, and ZIP code

Give us information about your homes

7. When did you sell your former main home? 7. ___ / ___ / ___ (month / day / year)
8. If you are providing the financing for the buyer of your former main home, what is the total amount of the loan? 8. ___ .
9. Have you bought or built another main home to replace the one you sold?
   - ☐ Yes. When did you move in? 9. ___ / ___ / ___ (month / day / year)
   - ☐ No.
10. Is or was any part of either your old or new home rented out or used for business?
    - ☐ Yes. You may need to fill out **Form 4797**. See the instructions for line 10.
    - ☐ No.

Calculate how much you gained on the sale

Do not include amounts you deduct as moving expenses.

11. What was the selling price of your former main home? Do not include the price of personal property items that you sold with your home. 11. ___ .
12. What were your selling expenses? Include sales commissions, advertising, legal, etc. 12. ___ .
13. Subtract line 12 from line 11. This is the amount realized. 13. ___ .
14. Go to the instructions for line 14, and follow the directions to calculate the basis of the home you sold. Write your answer here. 14. ___ .
15. Subtract line 14 from line 13. If line 14 is more than line 13, write 0. This is your gain on sale. 15. ___ .
16. Is line 15 zero?
    - ☐ Yes. Go to **Sign this form** on the back of this page.
    - ☐ No, and you have bought or built another home to replace the one you sold. Go to line 18.
    - ☐ No, and you have **not** bought or built another home to replace the one you sold. Go to line 17.
17. Do you plan to buy or build another home within the next 2 years?
    - ☐ Yes. See **How to File** on page 2 of the instructions for additional filing requirements. Then, go to **Sign this form** on the back of this page.
    - ☐ No. Go to line 18.
18. Do you want to take the one-time exclusion of gain for people age 55 or older? Choosing to take the one-time exclusion of gain is an important decision. Read the instructions for lines 18–23 before deciding to take the exclusion.
    - ☐ Yes. Go to line 19 on the back of this page.
    - ☐ No. Go to line 24 on the back of this page.

Form 2119, Sale of Your Home, which taxpayers use to report their capital gains or losses when they sell their homes. This form is one which the IRS believed that taxpayers understood and on which taxpayers made few errors.

Before beginning the redesign, DDC conducted a usability test on the original form to identify any existing problems. To be sure we addressed the concerns of all users, we tested the form with tax practitioners as well as with typical taxpayers.

Testing practitioners

To identify the potential problems with Form 2119, we first conducted telephone interviews with 10 tax practitioners, such as Certified Public Accountants or tax lawyers, who help taxpayers file their tax returns and who, therefore, would be familiar with the form. Interviewing practitioners gave us a professional perspective on both the areas of the form that ***they*** found troublesome, as well as the difficulties that they saw ***taxpayers*** having.

Using a structured interview, we explained the purpose of the test, assuring practitioners that their comments would be kept confidential; asked about the practitioners' backgrounds, levels of education, and work experience; and asked about their experiences with the form itself, specifically the terms and line items that they found confusing, as well as those that they thought taxpayers found confusing.

We found that although most practitioners said that they understood the form completely, they often disagreed about the meaning of specific terms and line items. Here are two items that we asked them to explain and a summary of what they told us.

> **Caution:** If the home sold was financed (in whole or part) from a mortgage credit certificate or the proceeds of a tax-exempt qualified mortgage bond, you may owe additional tax. Get **Form 8828**, Recapture of Federal Mortgage Subsidy, for details.

- 40 percent of the practitioners said they didn't know what this line meant.
- 20 percent said this line meant that the mortgage had been subsidized by the federal government.
- Each of the remaining 40 percent gave a different interpretation of the line.

> **Line 7** Basis of home sold (see instructions)

- 30 percent said that taxpayers should fill in the blank on this cryptic line with the amount paid for the home plus improvements.
- 10 percent said that taxpayers should fill in only the amount paid for the home.
- Each of the remaining 60 percent offered a variation on what could be added to or subtracted from the cost of the home.

If the professionals were interpreting terms differently, then average taxpayers were certain to be confused. Practitioners agreed that most taxpayers were confused either by the terms themselves or by the IRS's specific meaning of the terms. For example, the practitioners thought that, while taxpayers generally understand the concept of fixing-up expenses, they do not know what the IRS considers to be a fixing-up expense. Without that knowledge, taxpayers cannot correctly fill out the line that asks for fixing-up expenses.

Testing taxpayers

To find out how well typical taxpayers understood the form, we had 21 people fill it out on the basis information in one of three scenarios provided by the IRS. These people were tested one at a time using a think-aloud protocol.

The scenarios provided the raw data — such as purchase price of both the home sold and the home bought, date of the sale, and the dates and amounts of any remodeling that had been done — but the participant had to decide how to use the data to answer the form's questions. The IRS considered these scenarios to be basic enough that participants would be able to fill out the form without knowing tax law.

When participants had finished filling out the form, we followed up with a structured interview, which asked many of the same questions that we had asked the practitioners, such as which terms and line items were confusing and what specific terms and line items meant to them.

Taxpayers performance

Of the taxpayers we tested, 10% (two people) performed well. Only one person filled out the entire form correctly. One other person almost completed the form correctly, making only one error on a line that affected no other line on the form. Therefore, ***95% of the taxpayers tested filled out the form wrongly.*** Again, this was a form that the IRS believed had few errors.

In addition, we found that most taxpayers were uncomfortable with the completed form. Many felt they had done something wrong — some even knew exactly where they had gone wrong — but they didn't know what was wrong or how to fix it.

The results also told us that participants were most confused by the same three line items no matter which scenario they used.

> **Line 1b** Face amount of any mortgage, note (e.g., second

trust), or other financial instrument on which you will get periodic payments of principal or interest from this sale (see instructions)

- To correctly answer this item for all three scenarios, participants should have left the line blank, and almost everyone did. However, because the participants were thinking aloud, we found out that they left it blank not because they knew that was the right response, but because they didn t understand what the line meant. They were confused by whether "mortgage" referred to the amount of the original mortgage on the home or to the amount remaining when the home was sold. The word "get" also bothered them. They understood a mortgage to be something people pay not something they get.

Line 7 Basis of home sold (see instructions)

- This line caused more errors than any other. Because no participant was familiar with the phrase "Basis of home sold" and because the line ends with "see instructions", the participants turned to the IRS *Instructions for Form 2119*. The instructions began by explaining what to "include" and what to "subtract". However, participants would have to read eight more lines before the instructions specified the number to start with. Testing showed us that most people didn't read that far. Instead, participants simply took their best guess at what information the IRS wanted. Because the number they entered on this line affects four other lines, errors now multiplied.

Line 10 Subtract line 9f from line 8a

- This line seems straightforward. How could any writer improve it? The problem occurs because only a few taxpayers are required to fill out line 9f. So participants who had correctly skipped the line and, therefore, did not have a number to subtract weren't sure what to do.

Redesigning the form

Testing the 1991 form told us that taxpayers *were* making mistakes on the form, told us where they were making them, and *why*. These test results guided the form's redesign. For example, because testing told us that most errors came from three lines on the form — lines 1b, 7, and 10 — our primary goal was to reduce those errors on the revised form. Testing also told us that practitioners and taxpayers alike were confused by the financial terms on the form. Therefore, another goal was to simplify the language. Finally, hearing people sigh, moan, and mutter before they even began filling out the form told us that the form needed to look less intimidating.

Lines 1b, 7, and 10 had generated the most errors on the form. Most participants had left line 1b blank because they didn't understand it. To help them we changed this line from

> Face amount of any mortgage, note (e.g., second trust), or other financial instrument on which you will get periodic payments of principal or interest from this sale (see instructions)

to

> If you are providing the financing for the buyer of your former main home, what is the total amount of the loan?

Testing had told us that "line 7 Basis of home sold" had confused both test participants and practitioners more than any other line item. Practitioners had predicted that taxpayers would have trouble with this line, and 81 percent of the test participants did indeed make an error here; this in turn affected four other lines. Improving this one line would greatly improve the error-rate for the entire form.

Because testing had told us that taxpayers didn't know what numbers to use to calculate "Basis of home sold", we incorporated a mini-worksheet into the form's separate instruction page to guide them through the calculation. This worksheet shows taxpayers what number to start with and what numbers to add and subtract.

On the form itself, we changed the text from "Basis of home sold (see instructions)" to "Go to the instructions for line 14, and follow the directions to calculate the basis of the home you sold. Write your answer here". (Line 14 is the equivalent to line 7 on the revised form.)

On line 10 of the 1991 form, which directs taxpayers to "Subtract line 9f from line 8a", we found out that taxpayers didn't know what to do if they hadn't needed to fill out line 9f. To help them, we added a sentence explaining what to do if they had not filled out that line.

We also tried to simplify the language where we could. Although most of our participants were well-educated (76 percent had attended or completed college, and another 14 percent had attended or completed graduate school), they had difficulty understanding the terminology on the form. However, because rewording often had tax implications, we had to leave many terms unchanged. These continued to cause problems in the next round of testing.

In addition, we made many design changes to help people navigate through the form more easily and to make the form look less intimidating).

We then modified the instruction sheet to correspond to the redesigned form and to give taxpayers more information. Among other changes, we

- arranged the instructions in the order that taxpayers would need them, from the purpose of the form to how to file; and

- added information for more line items. The 1991 instructions addressed 27 percent of the line items on the form. The revised instructions addressed 76 percent of the line items, covering all lines except those requiring a straightforward calculation or a Yes/No response.

Testing the revised form

To ensure that the revised form worked, we tested it with 51 taxpayers. In this round of testing, however, time constraints dictated that we not use structured interviews or think-aloud protocols. Instead, we tested the taxpayers in groups of 10 to 12, having them fill out the new form based on data from the same three scenarios used to test the original form.

Because we had changed few terms on the revised form, we knew that taxpayers would still have problems with the form. Overall, however, we found that participants performed significantly better on the revised form than they had on the original. Of the taxpayers who tested the revised form, there was a ***45 percent increase*** in those who performed well over those who had performed well using the original form. In all, 55 percent performed well, compared with 10 percent who had performed well with the 1991 form. Specifically, ***29 percent completed the entire form correctly, compared with 5 percent who correctly completed the original form.*** As before, the balance who performed well made minor errors affecting no other line or only the last few lines.

We also found that, unlike the errors made on the 1991 form, which were grouped primarily on three lines, the errors on the revised form had no general pattern. Some people subtracted wrong lines; some people had trouble subtracting large numbers from small numbers; some people put an answer on the wrong line. But because we didn't use a think-aloud protocol when testing the revised form, we don't know why participants made these errors.

In general, we found that people using the revised form made fewer conceptual errors and seemed to understand the form and the instruction sheet better. In addition, when we compared the taxpayers performance on the lines that caused problems on the 1991 form (lines 1b, 7, and 10) with the corresponding lines on the revised form, we found that their performance greatly improved.

Participants using the revised form also appeared less confused and less frustrated than those who tested the 1991 form. Even without micro-level data, participants' body language suggested that while there were more line items on the revised form, they found it easier to fill out. Most participants using the revised form seemed to simply follow the instructions and move easily through the form, unlike those testing the 1991 form, who often seemed confused.

The value of conducting usability tests on Form 2119

In this project, usability testing benefited both DDC staff and the IRS. For our writers, the benefits coincided with those listed at the beginning of this article.

- Testing helped us work efficiently by

  - pinpointing the most critical problems — the three line items and the terminology;

  - pointing out that taxpayers made the most errors on line 7, allowing us to correct the most errors with the fewest changes; and

  - showing us why people made the errors they did, which directed the ways we attacked these problems.

- Testing ensured that the revised form did indeed meet the needs of the audience.

- Testing provided measurable proof to the IRS that the revised form worked significantly better than the original.

For the IRS, testing identified problems with the existing form. Without testing, the IRS would have continued to believe that taxpayers understood the items on the form and were making no errors when, in fact, ***95 percent of the people we tested filled out the original form incorrectly***. Because no form exists in a vacuum, the effects of these errors are widespread. Numbers from *Form 2119* are used on IRS *Schedule D*, which in turn are used on the *Form 1040*. By reducing these errors, the IRS will

- capture revenue lost by taxpayers' incorrect reporting,

- reduce costs from telephone calls made to and from taxpayers to clarify information or answer questions,

- improve the statistics generated from tax returns about individual income and the US economy, and

- improve the decisions based on these statistics.

For both DDC and the IRS, conducting usability testing was simply good business. But let's not forget the users. For the taxpayers, testing ensured that they have a form that is more easily understood and less frustrating to complete — a form that is clearly more usable.

Judicial decisions
a riposte

by Francis Bennion

In our zeal for clarity we must not distort the realities of legal practice. At the Law Society's last annual conference the Vice-Chancellor, Sir Donald Nicholls, won easy applause for his condemnation of the White Book (*Clarity* 29, p.4), but he ought to know that it is just not possible to rewrite this "in a form that anyone can understand". Lord Renton asked the Prime Minister to insist that all legislation should be "clear, simple, concise and unambiguous" (*Clarity* 29, p.5), which *he* ought to know is another impossible task. Dr Robert D. Eagleson's article *Judicial decisions: acts of communication* (*Clarity* 29, p.11) presents a travesty of the judicial function and is open to a number of objections. Here are some of them.

The article is written as if all judicial decisions are of the same type. In fact they are of widely differing types. Advice on how to present them must differ accordingly.

Dr Eagleson says "the purpose of a [judicial] decision ... is to communicate the law". It is not. The purpose is to resolve a dispute by applying the law to it. The dispute may be about the facts, or the law, or both. Presentation of the decision will reflect this.

The article assumes the parties to the litigation form the only audience. However, their advocates also form an audience, as does the profession at large and indeed the public at large. The way a judicial decision is formulated must take account of all the audiences.

The author confuses understanding a judicial ruling with accepting it as reasonable. He equates a case where antagonism is aroused because "organisations ... have fallen back on complicated provisions in small print to snatch a victory over you" with a case where one side cannot make sense of what the decision maker is saying and so feels disgruntled. The two are obviously different.

Then there is the usual blanket assertion that "we should use the active rather than the passive". But sometimes the passive is better, as in the very example Dr Eagleson gives. He says, as if the two variants meant the same, that an order stating "You must return the goods by 30 November" is preferable to one saying "The goods must be returned by 30 November". They don't mean the same. The first suggests, without being quite clear on the point, that the goods must be returned by the "you" in question and no-one else. The second allows for the possibility that the person might die or become incapacitated before 30 November, or the goods might pass into the possession of someone else. There is a possible difference in the persons bound by the order.

Technical terms, says Dr Eagleson, should always be explained. But do we really want judgments to be lengthened, and the time taken to prepare them extended, so that judges can pepper them with little homilies on the relevant law? Isn't that a job better done by the parties' legal advisers? (In the rare case where a party appears in person I accept that judicial explanations may be needed.)

Dr Eagleson says it is those judges who make themselves clear who impress "because the hearers go away satisfied". He adds: "They have understood the law — and that is what they came to court for". In my experience of litigation, extending over more than forty years, parties come to court to win their case. They go away satisfied when they *have* won the case, and not otherwise. Understanding the law is little comfort when your case has gone down, whether you think it went down justly or unjustly.

Of course these criticisms do not mean I am unsympathetic to attempts to improve the form and quality of judgments. I agree when Dr Eagleson says that judges must determine rigorously what is the real issue in the case and how the law applies to it. I note what is reported in *Clarity* 29 (p.5) about Dr Eagleson's understandable dissatisfaction that in the important *Mabo* case there are five separate judgments totalling some 200 pages. But in his article Dr Eagleson misses the one point that really could make a significant difference to the quality and usefulness of many judgments, namely the inclusion of a statement *in legislative form* of the rule(s) of law applied by the judge. This is particularly important when the applicable law is in dispute between the parties.

In this connection I refer the reader to the passage on interstitial articulation on page 20 of my article *Statute Law Reform — is anybody listening?* also published in *Clarity* 29. I suspect Dr Eagleson would condemn the phrase *interstitial articulation* as "inflated" or infected by what he considers the vice of "breadth of language". So I will conclude by explaining what I mean by it in contracted or narrow language.

The adjective *interstitial* refers to the interstices within a legislative formulation. Dr Eagleson might prefer to call them gaps, but there is a difference. A chain-link fence has interstices between the links; it does not have gaps unless it is broken. The interstices in a passage of legislation mark the places where the drafter has not felt able to be more detailed. Yet the court may find more detail necesarry in order to decide the point at issue. If a previous reported decision does not settle the point, the court must do so itself. What I am suggesting is that the court should do it by *articu-*

lating the missing words. It should do this in legislative form, that is by devising a form of words which the drafter might have used if he or she had gone into more detail.

This process of articulation is occasionally carried out by judges today, but it is rare. Yet it has great advantages. If either party wishes to consider an appeal on a point of law, the articulation makes it crystal clear just what the point of law is. It is that the judge's articulation is an incorrect formulation of the missing statutory rule. In future cases, if the judgment is reported or otherwise available for reference, the articulation makes it clear just what the case decided. The future court may follow it or (if it has the power) overrule it.

If the law in question is later reduced to code form (as I believe it should be whenever this is helpful), the codifier can use the articulation as part of the code. Wide availability of such articulations would simplify the process of codification and make it more likely to be carried out.

Finally, the articulation would tell the litigant precisely what rule of law the judge had used to decide the case. I'm sure Dr Eagleson would approve of that.

... and a retort

by Dr Robert Eagleson

Francis Bennion is recognised for his work on statutory interpretation. It is unexpected, then, to find him lapsing into misinterpretation and self-contradiction in his riposte, which he has labelled well. It has more the marks of a quick thrust than a considered response, as his introductory, tetchy parries at Sir Donald Nicholls and Lord Renton reveal.

My article, which was written to the tight limit of 1500 words imposed by the original editor, was commissioned to encapsulate the essence of a 7-hour workshop on communicating judicial decisions presented at their request to judges and registrars in one of our courts. This segment had been preceded by a 3-hour workshop on making decisions, led by a judge. The workshop has since been repeated for judges and registrars in a different court.

I do not give these background facts to excuse the article. It ought to be capable of standing on its own and it certainly should not contain error. But the facts have some pertinence to a discussion of Mr Bennion's riposte.

1. Mr Bennion is mocking words when he argues that the purpose of judicial decisions is not to communicate the law but "to resolve a dispute by applying the law to it". Because the resolution is in terms of the law, and not on any other basis, judgments set out the law. Judges and registrars — or at least the ones I was in the workshops with — do not simply declare the finding, but also add their reasons, and they see it as essential that the finding emerge from the reasons. The participants in neither workshop disputed that their role was to make the law clear to the parties so that they would recognise that the finding flowed unequivocally from it and was proper.

   Mr Bennion himself would seem to lean in this direction. Later in in riposte he argues that "the inclusion of a statement in legislative form of the rule(s) applied by the judge could make a significant difference to the quality and usefulness of many judgments", and he renews his advocacy of "interstitial articulation".

   In its favour, he asserts that "the articulation would tell the litigant precisely what rules of law the judge had used to decide the case". At this point to separate resolution of the dispute and communication of the law seems to be splitting hairs.

2. Mr Bennion seems to want authors to cover every aspect of a topic whenever they write. He chooses to ignore social context and current concerns. The fact that my article does not mention other members or potential members of the audience does not mean that it assumes that "the parties to the litigation form the only audience". Instead it takes for granted that lawyers already receive sufficient attention in the courtroom: their cause does not warrant further advocacy. The article and the workshop were concerned to promote a greater awareness of the parties to the litigation and an understanding of their condition and needs. It does assume — I think justifiably — that if they can grasp the decision, then their advocates should be able to do so. There is also a good probability that many in the public at large will be able to follow the ruling.

   In his opening paragraph, Mr Bennion takes Sir Donald Nicholls to task for wanting the White Book to be written "in a form anyone can understand", but he seems to

decisions be formulated to "take account of all the audiences".

3. The article does not make "the usual blanket assertion" (Mr Bennion's words) that "we should use the active rather than the passive" and Mr Bennion's use of these words confirms the hastiness of his response. I was careful to preface my remarks on voice with the words "when we are requiring someone to do something". It is only in this context that the stated preference for the active should be read and I selected this item as an example of language issues in the short article because it occurs frequently in the decisions of the workshop participants.

   Nor did I imply, as he suggests, that the two voices meant the same, but instead concentrated on the fact that the actor (or agent) was expressed in the active but not in the reduced version of the passive, which is used so commonly.

   Mr Bennion's argument that the passive is "better" in this particular context is shaky. At least the active "you must return the goods by 30 November" captures the 90+% who survive to fulful the requirement. By mentioning no-one, the passive "the goods must be returned by 30 November" could allow everyone to evade responsibility. If it is argued that this is an over-literal interpretation of the passive, so also is Mr Bennion's interpretation of the active — an interpretation which very few in the community would adopt. Mr Bennion is wielding a two-edged sword in this riposte.

   (In passing, I could add that we did discuss and confirm uses of the passive in the workshop. That I might do so is confirmed by my other writings on plain English. Mr Bennion might have acknowledged this.)

4. Mr Bennion disagrees with my proposal that judges and registrars should explain technical terms. He believes that this task might be better undertaken by the parties' legal advisers but gives a desire to keep judgments shorter as the only reason that the responsibility should be shifted from judge to adviser. However, having judges and registrars provide the clarification encourages them to be controlled in their use of terms and guarantees that all sides receive the same message.

5. Mr Bennion may have long experience with clients but it may not always have been very illuminating for them. Clients often hold back in the presence of their professional advisers, especially bewigged ones. They can be overawed and so may not reveal all their thoughts. Patients — if I may use another example — often enquire of nurses and pharmacists rather than their medical practitioners for much the same reasons.

   Obviously, in a court case winning is the immediate concern, but that gives way later to other interests, especially if one has lost. Then it is that understanding takes on more importance. It is not just a question of comfort, as Mr Bennion suggests, but can also be a crucial determinant for future action.

   Clients' failure to complain to barristers that they did not understand the ruling does not mean they do not complain at all nor that they do not want to understand. Even the winners in the *Mabo* case have criticised the obscurity of the ruling.

7. In an argument it is wrong to attribute to others lower standards than one's own, as Mr Bennion does when he takes up interstitial articulation. He knows my writings. I have never condemned richness of language itself as a "vice" but, as the article itself testifies, I oppose a mere display of language for self-aggrandisement or personal image without concern for other human beings. Never have I downgraded precision; always have I insisted that clarity must accompany accuracy, not replace it.

   In the article I propose that judges explain technical terms, not substitute inexact words for them. He has no grounds to say that I would prefer *gaps* to *interstices*. To caricature another's position and thereby seek to overthrow it by mounting a fake argument is unscholarly.

   In the midst of this sorry segment, Mr Bennion once again borders on the contradictory. He had argued earlier that judges could leave it to lawyers to explain technical terms to their clients: the judges need not trouble themselves and lengthen their judgments. Yet when he is writing to the learned legal readers of *Clarity*, he inserts a long explanation of interstitial articulation, even though readers had read about it in the previous issue and in his publications.

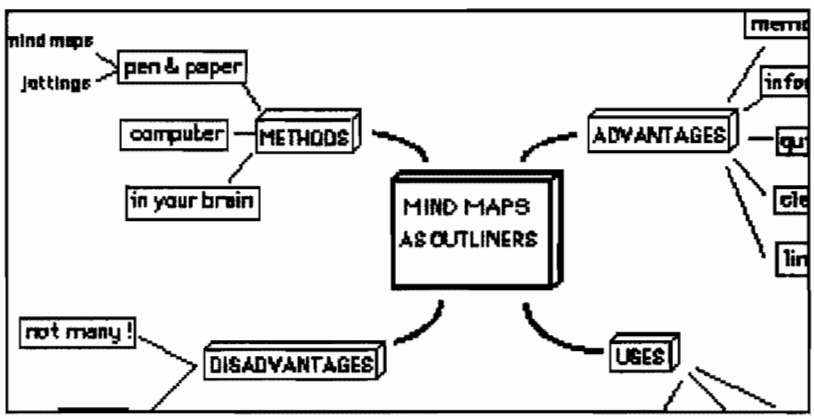
   But this inclusion of the explanation has a happy side. It shows that Mr Bennion does not follow his own precepts but rather practises what I preach.

Outlining

by Alison Plouviez
a solicitor employed by The Law Society

Good document organisation is just as important a plain English principle as short sentences. Simple, understandable language (and time) is wasted if the document as a whole is muddled and confusing.

There are several techniques for planning documents, most of which centre on choosing the right structure (for example, chronology, geog-raphy, or the alphabet). The choice of structure will be influenced by the purpose of the document.



Lawyers frequently use chronology as the basis for setting out, say, a letter to a client, or the facts of a case in a headnote or report.

Margot Costanzo

In her excellent paperback *Legal Writing* (Cavendish Publishing, £10.95), Margot Costanzo, a former solicitor and now teacher of legal skills, includes advice on structuring documents and outlining.

Using a judgment as an example, she shows that a chronological list of events can leave the reader uncertain of what is coming. Which fact is relevant to what? She recommends that we start not with the first event, but with a sentence explaining what is in issue. Then the reader is ready to pick out the significant elements of the story.

Her advice about preparatory outlining is to break the task into four stages, and to be prepared to repeat some of them:

1 Start stage 1 by brainstorming; end it with a list of every point you need to cover. Settle on the basic vocabulary - for example, how you will refer to the parties - and decide which terms of art need explanation.

2 Write down the problem in language which is "simple, clear, concrete and active". You *might* at this stage want to note your tentative conclusions.

3 Re-order your initial list into sections, under notional headings, limiting each section or subsection to about seven items to help the reader's memory.

4 Finally (and after repeating the earlier stages as often as necessary), write your conclusions.

Margot Costanzo is a firm believer in not writing too soon. Only do a first draft, she says, once your recommendations are clear in your mind.

Tony Buzan

Tony Buzan's mind maps are a kind of outliner. (If you are not familiar with this attractive and useful means of organising thinking and developing new ideas, you can find it in a number of his books, the latest of which is *Radiant Thinking* (BBC Books, hardback, £16.99).

Using a large sheet (preferably A3, unless you are neat even in draft) in landscape view, you put in the centre a simple graphic version of your topic: if you were writing a letter about a lease, for example, you might sketch a building. Then with colour, shape, and size (bigger and more colourful near the centre, for the most important concepts) you note your thoughts onto spokes radiating from the central image. The main headings surround the centre, and secondary and tertiary points spread out like fingers from them.

Mind maps can be used to get down first thoughts quickly and later to sort them out. They improve on ordinary preparatory writing because you can add to the map, and connect linked parts, very easily. They allow you to consider all your ideas at once, and get a clear idea of the whole of your topic. If you have never tried them, don't be put off by the apparent simplicity of the idea. It is one of the most useful things I have ever learnt.

Word processors

Many word processors include an outliner function. Others can be bought separately.

These enable you to plan your document on the computer. You can move around the outliner, and do things with it — like hide parts of the outline so you can see the main headings, that you probably cannot do with an ordinary word processing program.

However, I was frustrated by the difficulty of learning my outliner, and I doubt they justify the effort involved (unless you enjoy using computers) or that they are better than pencil and paper.

Drafting snippets

Organising documents

Here is an extract from a typical lease (in this case of a flat in a Surrey block):

> **2. The Tenant hereby covenants with the Lessor and with and for the benefit of the owners and lessees from time to time during the currency of the term hereby granted of the other flats comprised in the Building that the Tenant and the persons deriving title under him will at all times hereafter observe the restrictions set forth in the First Schedule hereo**
>
> **3. The Tenant hereby covenants with the Lessor as follows:-**
>
> **(1) ...**
>
> **4. The Tenant hereby covenants with the Lessor and with and for the benefit of the owners and lessees from time to time during the currency of the term hereby granted of the other flats comprised in the Building that the Tenant will at all times hereafter during the said term so repair maintain uphold and keep the Flat as to afford all necessary support shelter and protection to the parts of the Building other than the Flat and to afford to the lessees of neighbouring or adjoining flats or premises access for the purposes and conditions set out in Clause 3(9) hereof**

These clauses should have been numbered 2(a)-(c), so that clause 2 related to tenant's covenants in the same way as clause 5 related to landlord's covenants. Moreover, the words common to all parts could be taken out of the individual subclauses and written once as a lead-in line applicable to all of them. This would save much confusing repetition.

Nor is there any justification for hiving off one set of covenants to a schedule at the end whilst listing another set in the main clause. Apart from the logic, it would be convenient to have them adjacent.

"Defining" the parties

Definition clauses customarily begin with the parties. So we have

> **"The Company [or Landlord or Assignee]" means Nogood Limited whose registered office is at ...**

But it is a mistake to treat this as a defintion in the same way as, for example, the definition of "the flat". The flat is defined as (say) 56 Kingfisher Court, and so it remains throughout the text and throughout the term. The tenant is *named* as Nogood Ltd, but is not always that company, either throughout the document (as successors in title are included - by law if not expressly) or throughout the term (if the lease is assigned).

It is more accurate to separate the "details" (strictly, the "original details") from the "definitions".

Deeds by companies

The Land Registry approve this wording for the execution of deeds by companies:

> **Signed as a deed by Samuel Bernard as director authorised to sign on behalf of Sound Limited.**

The citation of the signatory's authority is essential.

From a recent building contract

In this Agreement unless the context otherwise requires references to recitals clauses and schedules are references to recitals clauses and schedules in or to this Agreement and references to this Agreement include references to the schedules which schedules form part of this Agreement.

Professor Joseph Kimble writes of his autumn visit to Australia and New Zealand

My visit was sponsored by the Law Foundation Centre for Plain Legal Language at the University of Sydney.

The Centre put together a whirlwind tour — over 30 lectures and seminars throughout Australia. I was in Sydney, Perth, Adelaide, Brisbane, Melbourne, Newcastle, Wollongong, and Canberra. I spoke to law firms, law schools, law societies, legislative drafting offices (parliamentary counsel), and government agencies.

In New Zealand, the New Zealand Law Society sponsored a series of half-day seminars in Dunedin, Christchurch, Auckland, Hamilton, and Wellington. For all those seminars, I was joined (and outperformed) by Stuart Walker, a member of CLARITY. It was great fun travelling with Stuart. I also enjoyed visiting the New Zealand Law Commission, whose president, Sir Kenneth Keith, is another CLARITY member.

Back to Australia. My impression may be colored a little because I usually had a friendly audience, but I'd say that Australia is taking the world lead in plain language. Here are a few examples:

- The Centre for Plain Legal Language is very busy with training, drafting, and research projects. We owe a big debt to the Law Foundation of New South Wales for funding the project.

- Some of the largest and most respected law firms are converting their precedents to plain language. The first was Mallesons Stephen Jaques. Now Minter Ellison Morris Fletcher, and Phillips Fox. CLARITY members have been involved in this work, which may be having a ripple effect. After I talked to one firm in Adelaide, the managing partner stood up and said, "We have to do this because our competitors are doing it."

- The respective Parliamentary Counsel of Queensland and New South Wales have publicly endorsed a plain English style of drafting, and it shows in their work.

- In September 1993, the Commonwealth Inquiry into Legislative Drafting released a comprehensive report called *Clearer Commonwealth Law.* The report says that "the plain English style developed by the drafting agencies since the mid-1980s has made new Commonwealth legislation much easier to understand." The report sets out a series of recommendations to further improve the process and style of legislative drafting.

- In 1991, another Commonwealth committee, on banking, released a report called *A Pocket Full of Change.* It recommended that "a requirement for plain English documents be incorporated into the code of banking practice." In November 1993, the banking association committed itself to documents that are "clearly expressed" rather than in plain English. I wonder what they think the difference is.

- In November 1993, the Commonwealth Attorney-General appointed a four-member task force (which includes CLARITY member Robert Eagleson) to simplify the corporations law (see *Clarity* 29, page 3).

- The Trade Practices Commission is conducting a survey of consumers' experiences with life insurance and superannuation agents. Part of the survey is a program to assess the comprehensibility of the documents.

That's not all, as readers of *Clarity* already know. In the last issue, for instance, Phillip Hamilton reported that his firm has rewritten a plain-language commercial lease for the Law Institute of Victoria, and that the Institute's Legal Documentation Committee is now committed to plain language. I heard a lot of stories like that, but I also heard enough horror stories and saw enough bad examples to confirm how deep and stubborn the infection of legalese is.

Anyway, it was a great trip: spectacular countries, friendly people, and a righteous cause. And speaking of the cause, your last issue reminded me about the paltry number of CLARITY members from the United States. We're going to do something about that.

Editor's note: I was able to chart Joe Kimble's travels from the enquiries coming in about CLARITY.

BACK NUMBERS

of *Clarity* are available at the following prices:

Issues		
1-4	£1	each
5-11	£1.50	"
12-24	£2	"
25-29	£3	"

CLARITY TIES

are available at £8.50 each

KELLY'S *Draftsman*

We understand that there have been some production problems, and are postponing our review until these have been resolved.

News about members

Trevor Aldridge QC has been appointed President of the Special Educational Needs Tribunal.

Michèle Asprey was due in England for the last two weeks in March.

Richard Bagley is now the solicitor and company secretary to the Agricultural Mortgage Corporation plc

Malcolm Cooper-Smith has moved from Allied Dunbar to T. Rothschild Assurance plc.

Geraldine Cotton has left private practice and joined the College of Law at Breams Buildings, off Chancery Lane, where she is developing post-qualification courses for specialist solicitors. The work is at an early stage, but it is anticipated that the courses will be a mixture of distance- and face-to-face learning. Ms Cotton hopes that the first course will be running by the beginning of next year.

Kenneth Crawford has retired from the position of chief legal executive at Newcastle-under-Lyme Borough and as chairman of law reform at the Institute of Legal Executives. Having moved home as well, he is now secretary to Helensburgh Community Council, Scotland.

Robert Eagleson is due in England in July.

David East is retiring on 30th April. **Paul Matthams**, his partner at the Jersey branch of Gouldens, is taking over the firm's CLARITY membership.

John Fletcher, who gives writing courses for accountants, lawyers, and others, and runs a small publishing house in Maidenhead, is working with HMSO to develop style-checking software based on Gowers' *Complete Plain Words*.

Malcolm Harrison writes from the Centre for Plain Legal Language, Sydney:

> We are in the middle of negotiations about the future of the Centre and, at this stage, the organisational details of the Centre are still vague.
>
> The Centre's operations have been funded by the Law Foundation of New South Wales. The funding agreement finished at the end of 1993 and the Law Foundation has decided not to provide further funds.
>
> The Faculty of Law (of the University of Sydney) has agreed to support the Centre's continued operation although there would not be any direct monetary support. But as the Centre has accumulated a reasonable bank balkance from its consultancy work, it looks as if we can continue for at least another year.
>
> As you have heard, **Peter Butt** has resigned as Academic Director. He continues to work closely with us on plain language matters but has decided to spend more time on his academic writing, especially on finishing a couple of major land law texts.
>
> You may also have heard that **Judith Bennett** has left the Centre. She has moved to Melbourne where she is working with Freehills (one of the largest law firms in Australia).
>
> **Mark Duckworth**, the Research Fellow at the Centre, now has responsibility for the Centre's research, training, and consultancy programs.
>
> I've been Executive Director since November 1991. At this stage my role in the "new look" Centre is unclear. The Faculty are committed to a new management structure by Easter so we can give you an update then.

Robert Owen has left private practice in central London for a teaching and research post in the Department of Professional Legal Studies at the University of Bristol, from where he writes:

> The department's main teaching will be on the LPC course. We have decided that our preferred style of drafting (and that which we shall be teaching) will be the Clarity style. The whole department has applied to join.

From the committee

Chairman stands down

By the annual supper in October I will have chaired CLARITY for five of its eleven years. It has been an honour and a pleasure, and I will be sad to step down, but it is time for a change.

Justin Nelson is willing to take the chair, and the committee supports him. He has been an active member of CLARITY since the beginning, and has served on the committee since 1985, when he filled the vacancy left by Richard Thompson's resignation. He has been treasurer - an onerous and job - since John Walton stood down in 1987, and has been at the same time *Clarity*'s principal book reviewer. He is a skilled plain language drafter and, a practising solicitor with wide general experience.

We are looking among the members for a suitably qualified replacement treasurer. Is anyone willing to take it on.

It has been kindly suggested (to my relief, but my wife's regret) that I continue to edit this journal, and I hope I may do so for a while yet.

Other nominations for these and other posts are invited, and there will be elections at the annual supper. Members not attending may send postal votes.

Mark Adler

CLARITY precedents

Chris Smith bows out ...

Our congratulations to Chris Smith on his new legal-commercial post with Oriflame in Brussels (to which he is moving from the Midlands at the end of April), and on the birth of his daughter, a first child.

Because of these new commitments he feels he must give up the collation of the CLARITY precedent library. We wish him the very best of luck and are glad that he plans to remain an active member.

The library has been a difficult job. He took it on after it had been in the doldrums for some years, but despite his efforts we still do not have a collection which reflects CLARITY's potential.

... A CLARITY book

The committee feels that the library would do better if members were to have some commercial return for their drafting skills. Mark Adler has been editing a precedent book for Tolley Publishing as a private venture, and this is now to be a CLARITY project. The publication of details would be premature, but if anyone is interested in submitting precedents they should contact Mr Adler at the address opposite. Modest payments will be made for each precedent used and the authorship will be credited.

New CLARITY SEMINARS

on writing plain legal English

CLARITY now offers seminars by

Professor John Adams and **Trevor Aldridge QC**

28 Regent Square
London E3 3HQ
081 981 2880

Birkitt Hill House
Offley, Hitchin
Hertfordshire
Tel: 0462 768261
Fax: 768920

and (as before) by

Mark Adler

(whose contact details appear opposite)

All seminars comprise a mix of lecture and drafting exercises. **Professor Adams** concentrates on property and commercial law, and **Mr Aldridge** on commercial leases and other property documents. **Mr Adler** deals with drafting in general and for part of the time works on documents supplied by the host firm.

All the seminars last 3hrs 30mins (including a 20-minute break). Mr Adler's is accredited under the CPD scheme, with a 25% uplift. Accreditation of the other seminars is under discussion.

The fee is currently £500, rising to £600 for seminars held after 31st August. Expenses and VAT are added, and an extra charge may be negotiated for long-distance travelling. CLARITY's share of the fee is 10% now, rising to £150 on 1st September.

Please contact the speaker of your choice.

The Solicitors' Conference 1994

This is the first of the new-style conferences organised by The Law Society. CLARITY was to have had a mainstream slot, but shortage of time has demoted us (and, incidentally, at least one of The Law Society's own presentations) to a fringe meeting. We are scheduled for 5.30 pm on Friday, 7th October at the Queen Elizabeth Conference Centre in Parliament Square, London.

Our presentation will address the fears about plain English expressed by solicitors in our recent research project. We hope to persuade our audience that the change of style will improve efficiency, client relations, and profits; that clear drafting will not be penalised by the bench; and that significant improvements can be made by a few quite simple and uncontroversial changes.

CLARITY will be represented by two judicial members. Lord Renton QC - a former recorder - is to chair the meeting, and the presentation will be given by Judge Michael Cook, a former solicitor.

Annual supper: 28 Oct

We are retaining the successful format of the last couple of years, holding the supper in a London restaurant at 6pm for 6.30pm on the last Friday in October. We hope to welcome those whose Law Society commitments kept them away last year, when the supper coincided with the LS conference.

Welcome to new members

Australia

Christopher Balmford; solicitor, Phillips Fox; Melbourne
Fioa Beith; solicitor, and Sydney Precedents Manager, Minter Ellison Morris & Fletcher
Louise Herron; solicitor, Minter Ellison; Sydney

England

Prof Ruth Anand; solicitor; University of Bristol
Peter Byworth; retired chartered accountant; Ldn SW1
Jonathan Crosbie; student, London E9
Susan Holland; solicitor and law lecturer, University of Bristol
Penny Hopkinson; technical writer and publisher, Manual Writers; London W6
Stephen Hurley; trainee solicitor; Birmingham
Dr John Kirkman; communications consultant; Marlborough, Wiltshire
Legal Information Resources Ltd; legal publishers; Hebden Bridge, Yorkshire
Tim Press; solicitor and law lecturer, University of Bristol
Revd Bruce Sharpe; CofE priest, Bexley Magistrates Court (and retired local government officer); Kent
Paul Venton; solicitor, Woolsey Morris & Kennedy; Sidcup, Kent
Emma Whewell; solicitor and law lecturer, University of Bristol

Scotland

The Scottish Legal Aid Board; Edinburgh
David Sellar; law lecturer, University of Edinburgh

Wales

Gwyn Winter; PhD linguistics student, University of Wales in Bangor

As we go to press on 13th April we have 483 members in 21 countries

Honorary President: John Walton

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Clarity is edited by Mark Adler and published from his Surbiton address.

Membership application form

please copy as required

These details will be kept on computer. They may be given to other members or interested non-members (although not for the purpose of mailing lists).

Membership in name of individual		
Title	First name	Surname
Firm	Position in firm	
Professional qualification	Occupation if different from qualification	

Membership in name of organisation
Name of organisation
Nature of organisation
Contact

All members		
Address		
DX	Telephone	Fax
Specialist experience		

Please send this application to

(United States and Canada)

Professor Patricia Hassett
College of Law
Syracuse, NY 13244, USA
Tel: 315 443 2535 (Fax: 4141)

with a cheque for US$25

(Everywhere else)

Justin Nelson
Meridian House
St David's Bridge, Cranbrook, Kent TN17 3HL
(DX 38954 Cranbrook)
Tel: 0580 714194 (Fax: 714909)

with a cheque for £15 sterling or (in Britain) a completed standing order form

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£15 now; £15 on 1.9.95, and £15 on 1.9.96 Signed _____