

A movement to simplify legal English

Patron: Lord Justice Staughton

No 32: March 1995

## Index

### Articles

- It's Official: New South Wales Solicitors Favour Plain Language .....3
- Answering the Critics of Plain Language .....8
- The Balmford-Duckworth Tour of the United States — and Their Message That Plain Language Pays .....15
- An Excerpt From *The Costs of Obscurity: A Discussion Paper on the Costs and Benefits of Plain Legal Language* .....17
- An Excerpt From *The Cost of Justice: The Lord Chancellor's Review of Spending on Legal Services* .....20
- Comments on a New Plain Language Law .....22
- Plain English Campaign Holds Third International Conference .....29
- Selected Remarks from the Third International Conference .....30

### Bits and Pieces

- Committee News .....40
- 1995 Clarity Awards .....42
- CLARITY recognized in *Hansard* .....42
- The Missing Link: Bringing the User Into the Information Lifecycle .....43
- Top of the Form .....44
- Plain Englishing the Anton Pillar Order .....46
- New Police Caution Is a Loser .....47
- A Win for the Outgoing Chairman .....47
- A Breakthrough in Formbooks? .....47
- Danka Introduces a Short-Term Lease in Plain Language .....48

### Book Reviews

- *A Practical Guide to Usability Testing* .....49
- *Drafting and Negotiating Commercial Leases* .....49
- *Drafting Settlements of Disputes* .....50
- *Mellinkoff's Dictionary of American Legal Usage* .....51

### Letters

Letters .....53

New Members .....2

News About Members .....59

### News from Around the World

- Australia .....35
- Canada .....36
- England .....36
- Europe .....36
- United States .....38

## Editor's Note

I'm honored that Mark Adler asked me to serve as guest editor for this issue of *Clarity*.

Mark has certainly earned a respite. I don't know how he has done this for so long — without losing his sanity or his marriage. We owe him a heavy debt.

To avoid an international incident, I tried to edit lightly. I did add a few commas, especially the serial comma (a, b, and c). And I used the long dash. But I did not try to conform the articles to one style or another, British or American. At any rate, I hope you will overlook the inconsistencies and imperfections and will enjoy reading this issue.

Incidentally, I should say a word of thanks to Thomas Cooley Law School and Dean Michael P. Cox. He helped to subsidize this issue with a generous allowance for my desktop-publishing specialist.

These are hopeful times for the plain-language movement. True, we have lost some organizations — the Law Reform Commission of Victoria, the Plain Language Centre in Toronto, the Plain Language Institute of British Columbia. But their work lives on, new groups arise (see this issue), and we now have a solid base of committed supporters in several countries. If CLARITY stays healthy and grows, then so does the movement.

Somebody told me once that a reformer needs a geologist's sense of time. Fine. Let's call the last 400 years the era of legalese. Now begins the era of plain language.

— Joe Kimble

## Subscriptions

The subscription for the year beginning 1st September is now due, unless you first joined CLARITY during 1994 (in which case you are exempt) or you have paid by standing order.

The next issue will be edited by Peter Butt, at the University of Sydney. The deadline for submissions is May 1. You may send them to Mark Adler or directly to Peter at the University of Sydney, Faculty of Law, 173-175 Phillip Street, Sydney, NSW 2000, Australia.

## Welcome to New Members

### Australia

**MLC Life Ltd, Financial Services** —  
North Sydney

**Katrina Williams** — solicitor and precedents  
manager, Baker & McKenzie; Sydney

### Canada

**Neil Trenholm** — lawyer; Winnipeg

### Denmark

**Den Danske Bank (Biblioteket)** —  
Copenhagen

**Inger Johnsen** — senior translator, Den  
Danske Bank; Copenhagen

### England

**Rachel Conn** — solicitor; Cambridge

**Patrick Farrant** — solicitor, Eversheds Daynes  
Hill & Perks; Norwich

**Dr. Janita Good** — law student, A.H. Dun-  
combe & Co; Thame, Oxfordshire

**Angela Green** — solicitor, Bowcock Cuerden;  
Nantwich, Cheshire

**Linda Harrison** — solicitor, Jaques & Lewis;  
London

**Edward Hathaway** — solicitor, Barlow Lyde &  
Gilbert; London

**Kenneth McRae** — solicitor, Bowcock  
Cuerden; Nantwich, Cheshire

**Jane Norre Nielsen** — research student,  
University of Central Lancashire; Preston,  
Lancashire

**Caroline Peters** — law student, Hextall  
Erskine & Co; London

**Colin Read** — law student; York

**Peter Rush** — plain language teacher;  
Liverpool

**Christopher Shepherd** — solicitor, Shepherd  
& Co; West London

**David Tench** — solicitor, European Research  
into Consumer Affairs; London

**Richard Wheen** — solicitor, Linklaters &  
Paines; London

**Janet Wright** — solicitor, Wrights; St. Albans,  
Herts

### Germany

**Ralph Czarnecki** — law student; Bochum

### Netherlands

**Katherine Andrian** — freelance translator  
(training as a legal translator); Hertogenbosch

**Louise Rayar** — legal translator; Epen

### Scotland

**Colin Ferguson** — Head of the Department  
of Communication and Languages, Telford  
College; Edinburgh

### Sweden

**Justitiedepartementet** — Stockholm

**Honorary President:** John Walton

#### Committee

Mark Adler (editor)	28 Claremont Road, Surbiton, Surrey KT6 4RF DX 57722 Surbiton	081 339 9676 Fax: 9679
Richard Castle (CLARITY Mark administrator)	118 High Street, Hurstpierpoint, West Sussex BN6 9PX DX 94803 Hurstpierpoint	0273 833171 Fax: 832007
Alexandra Marks	Linklaters & Paines, 160 Aldersgate Street, London EC1A 4LP DX 10, London	071 606 7080 Fax: 600 2885
Justin Nelson (chairman)	Meridian House, St. David's Bridge, Cranbrook, Kent TN17 3HL DX 38954 Cranbrook	0580 714194 Fax: 714909
Nick O'Brien (treasurer)	4 Brick Court, Temple, London EC4 DX 404 London (Chancery Lane)	071 797 7766 Fax: 7700
Alison Plouviez	The Law Society, 50 Chancery Lane, London WC2A 1SX DX 56 London/Chancery Lane	071 242 1222 Fax: 0057
<b>and in the United States</b>		
Prof. Patricia Hassett	College of Law, Syracuse, NY 13244, USA	315 443 2535 Fax: 9567

*Clarity* is published from 28 Claremont Road, Surbiton, Surrey.

This issue was prepared on an Apple Macintosh computer using FrameMaker publishing software.  
Submissions should be accompanied, if possible, with a copy on 3.5" disc in either Macintosh or DOS format.

## It's Official: New South Wales Solicitors Favour Plain Language

Michèle M. Asprey

Chair, Plain Language Committee  
Law Society of New South Wales

In August 1994, the Plain Language Committee of the New South Wales Law Society surveyed the attitudes of NSW solicitors to plain language in legal drafting. The survey took the form of a one-page questionnaire inserted in the August issue of the *New South Wales Law Society Journal*.

The results have been tallied and it is now official: solicitors in New South Wales say they are in favour of plain language in legal drafting, and they say so by an overwhelming majority.

The survey form is set out as Table 1. The percentage results are in Table 2.

### The statistics

93% of respondents answered "yes" to question 1: "Are you in favour of plain language in legal drafting?" Only 4% answered "no", and 3% were undecided.

Almost 95% thought that it was possible to draft legal documents in plain language, and almost the same percentage thought it was appropriate. A lesser percentage — 85.5% — said that they understood what is involved in plain language drafting. And an extraordinary (and encouraging) figure of 80.5% of respondents said that they want to learn more about plain language drafting.

A total of 1068 people responded to the questionnaire. This is an extraordinary figure in itself. The survey had one of the best responses to any survey ever conducted by the NSW Law Society.

### The response rate

The response rate was particularly good for a survey that had no reply-paid or DX envelope. Not only did people have to go to the trouble of answering the questions, but they also had to get an envelope, put the questionnaire in it, and send it in. A surprising number of people made that effort.

Some people did not answer the questions, but instead made detailed comments. That in itself answers the first question the Plain Language Committee had: do solicitors in NSW care *at all* about the use of plain language in legal drafting? The results indicate that they do — that solicitors in New South Wales feel quite strongly about the issue of plain language in the law.

### The table of results

Table 2 summarises the results of the survey, on a percentage basis, question by question. Questions 1, 2, and 3 were similar and had a similar response: The percentages of people who said that they were in favour of plain language in legal drafting, that they thought it was possible, and that it was appropriate, were 93%, 94.8%, and 94.9% respectively.

Questions 4, 5, 6, and 7 focused on whether people practise what they preach. 95.7% of respondents said they would draft in plain language if they had a choice, and 96% said that they draft letters and other work-related material in plain language. But only 83.2% said they actually draft legal documents in plain language, and only 85.5% said they thought they understood what is involved in plain language drafting.

Question 8 was a "control" question, to test whether the number of those opposed to plain language was consistent with those in favour of it. It was: 5.5% of respondents said they were opposed to legal drafting in plain language, which corresponds reasonably well with the 4% who answered question 1 with a "no", they were not in favour of plain language in legal drafting — especially when you take into account the 3% who answered question 1 "undecided".

Only 14.2% of respondents said they had any plain language training before they were admitted as solicitors, and 19.7% said they had some training after admission. And 80.8% want to learn more about plain language drafting.

Of course, these figures cannot be seen as definitive. The survey was not very "scientific", and it can't be said to conclusively represent the views of the majority of the profession in New South Wales. It only represents the views of those who responded. And those who responded are most likely to be those who are interested in plain language — either enthusiastically in favour of it or vehemently opposed. Those who are too busy to respond to surveys, or can't be bothered, would probably have a moderating effect on the statistics.

But the response is so overwhelmingly in favour that the Plain Language Committee feels optimistic about what the results of a more comprehensive survey might be.

### What does "plain language" mean?

A few respondents criticised the Committee for using the term "plain language" without defining it. They said it was too vague a term to be useful in a survey, and some people refused to answer most of the questions on that basis. A couple of people thought the survey was biased in favour of plain language.

Our decision not to define or explain the term was deliberate. Other legal language surveys have avoided using a descriptive term like "plain language". But when our Plain Language Committee first met, it agreed that there was no one form of plain language, and that it would be counter-productive to confine ourselves to one rigid definition. So we decided to use the term in the survey without explaining it. We hoped that the way that people responded to the term would tell us whether solicitors were familiar with it. Most respondents were. Very few people questioned the use of the term or asked what it meant. We think this shows that the term "plain language" has good "market penetration".

### Those opposed or cautious

A couple of respondents expressed the view that there was no such thing as plain language — that there was only "good English" and "bad English". They felt that they were taught to write well at school, and that was enough. One person wrote, "Present drafting is OK. I can speak English".

A few people were somewhat sceptical of or cautious about the aims or effects of plain language. Several were concerned that plain language drafting would lack precision. A couple of respondents said they thought that technical work ought to be done in a technical manner.

A complaint that came up several times was that practitioners don't have enough time to worry about such matters, especially if it involves amending all office precedents. One said, "It is not a priority and there is only so much time".

### Those in favour

Then there was the opposite side of the coin: those who felt strongly enough about the need for plain language to write detailed comments, and even send in separate letters supporting the idea and the work of the Plain Language Committee. There were many other comments along the lines of "I'm doing it, but there is always more to learn"; and several people made comments along the lines of "It is essential if service to clients is a priority". One person said, "Just do it. (We have)."

The responses highlight a number of misconceptions solicitors have about plain language in legal drafting, and they also point up a number of legitimate concerns. They show us that plain language has a high rate of acceptance in the profession, but it is not a "done deal" yet.

## American surveys

The original impetus for the survey was to see if Australian solicitors shared the views of their colleagues in several of the United States of America about plain language. The first, and most famous, study done on a reasonably large scale to determine lawyers' attitudes to plain language was done in Michigan in 1987, by Professor Joseph Kimble.<sup>1</sup> That study has since been replicated in 3 other states in the US.<sup>2</sup>

Most *Clarity* readers are probably familiar with the Kimble study. Kimble asked several hundred lawyers to compare legal passages written in traditional legal language and then rewritten in plain language. Neither was labelled as "plain language", "legalese", or anything else. The result was that **80 % of the lawyers** who responded to the survey, **and 85% of the judges, preferred the plain language versions.** In the Florida survey, 80% of lawyers and 86% of judges preferred the plain language versions. In Louisiana and Texas, the survey went only to judges. In both states, 82% of judges preferred the plain language versions.

The New South Wales survey was simpler than the US surveys. It didn't use samples of writing. It did use the word "plain language". It was not the same sort of survey by any means. But it was a survey of attitudes, and it was simple and easy to complete. Perhaps that is why it had such a good response rate. It also went out to a much larger sample of lawyers: a potential target of 14,500 recipients of the *Law Society Journal* — mostly solicitors, with a few barristers and a small number of other subscribers to the *Journal*.

Even though it was a fairly informal survey, and, for all the reasons already mentioned, we must read the results cautiously, we have already had requests from lawyers who want to replicate the survey in other states of Australia. It seems that there is quite a lot of interest in what Australian lawyers have to say about plain language in the law.

<sup>1</sup> Steve Harrington & Joseph Kimble, *Survey: Plain English Wins Every Which Way*, 66 Michigan Bar Journal 1024 (1987)

<sup>2</sup> Joseph Kimble & Joseph A. Prokop, *Strike Three for Legalese*, 69 Michigan Bar Journal 418 (1990)

The members of the Plain Language Committee now think they have a pretty good idea what many solicitors in New South Wales think about plain language. We know that there is a lot of support and enthusiasm, some uncertainty, some reasonable concerns, a degree of scepticism, and even some hostility. There's also a great willingness to learn more about plain language and the law. That's something the Committee is keen to build on.

(Acknowledgment: This article appeared first in the November 1994 issue of the *New South Wales Law Society Journal*, in a slightly different form.)

## For all the right words

---

**Seminars and courses on advanced writing  
skills (including plain English for lawyers)**

---

**Editing and design  
of plain legal documents**

---

Martin Cutts  
69 Bings Road  
Whaley Bridge  
Stockport SK12 7ND



Table 1  
PLAIN LANGUAGE SURVEY 1994

- 1. Are you in favour of plain language in legal drafting?  YES  NO  
 UNDECIDED
- 2. Do you think it is possible to draft legal documents in plain language?  YES  NO
- 3. Do you think it is appropriate to draft legal documents in plain language?  YES  NO
- 4. Do you think you understand what is involved in plain language drafting?  YES  NO
- 5. Do you draft legal documents in plain language?  YES  NO
- 6. Do you draft letters and other work-related material in plain language?  YES  NO
- 7. If you had a choice would you draft in plain language?  YES  NO
- 8. Are you opposed to legal drafting in plain language?  YES  NO

Please give reasons.....

- 9. Have you had any formal training in plain language drafting?  
Before Admission  YES  NO  
After Admission  YES  NO

- 10. Would you like to learn more about plain language drafting?  YES  NO

Why?.....

Any further comments?.....

.....

- 11. Are you a principal or partner, employee, corporation solicitor, government solicitor, non practising solicitor? *Please circle.*

Please return your completed response to: Mr. Kevin White  
Responsible Legal Officer  
Plain Language Committee  
Law Society of NSW  
DX 362 SYDNEY

Table 2

## PLAIN LANGUAGE COMMITTEE SURVEY 1994

## Questionnaire Results — Percentages

<u>Question</u>	<u>Summary</u>	<u>Yes</u>	<u>No</u>	<u>Undecided</u>
1	Are you in favour of PL?	93.0%	4.0%	3%
2	Is it possible to draft legal docs in PL?	94.8%	4.7%	0.5%*
3	Is it appropriate?	94.9%	4.9%	0.2%*
4	Do you understand what is involved in PL?	85.5%	14.5%	—
5	Do you draft in PL — documents?	83.2%	16.8%	—
6	Do you draft in PL — letters?	96%	3.7%	0.3%*
7	If you had a choice, would you draft in PL?	95.7%	4.3%	—
8	Are you opposed to legal drafting in PL?	5.5%	94.5%	—
9a	Training before admission?	14.2%	85.8%	—
9b	Training after admission?	19.7%	80.3%	—
10	Do you want to learn more about PL?	80.5%	19.5%	—

## Notes

1. Questions set out in detail in Table 1.
2. PL stands for plain language.
3. Percentages are rounded up or down to one decimal point.
4. There was no option for Undecided in questions 2, 3, and 6.

## Answering the Critics of Plain Language

Joseph Kimble

This is an excerpt from an article that will appear in 1995 in the *Scribes Journal of Legal Writing*. The article in the *Scribes Journal* will also consider, once again, the old myths about debasing the language and about having to choose between clarity and precision.

Let me begin by distinguishing between the old criticism of plain language and the new criticism.

The old criticism has come mainly from within the legal profession. These critics say, mistakenly, that plain-language advocates want baby talk or a drab, simplified version of English; that plain language does not allow for literary effect; that plain language is impossible because legal language includes so many terms of art; and that plain language is not as precise or accurate as traditional legal writing. I have looked at those misconceptions in another article.<sup>1</sup>

The new criticism comes mainly from outside the legal profession. Robyn Penman, from the Communication Research Institute of Australia, argues that there is no hard evidence that plain language improves comprehension; that plain-language advocates tend toward a narrow, text-based approach to communication; and that the only way to be sure whether readers understand a document is to test it on the readers.<sup>2</sup>

My response to Penman and the new criticism:

<sup>1</sup> Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 *Thomas M. Cooley Law Review* 1, 19-22 (1992).

<sup>2</sup> Robyn Penman, *Unspeakable Acts and Other Deeds: A Critique of Plain Legal Language*, 7(2) *Information Design Journal* 121 (1993).

There is long-standing evidence that plain language improves comprehension.

- Some of the pioneering research into plain language was done by the Document Design Center of the American Institutes for Research, in Washington, D.C. Among its early publications, in 1981, was *Guidelines for Document Designers*, by Daniel Felker, Janice Redish, and others. This book set out 25 guidelines for clearer communication, and each one included references to the supporting research.
- In a study of jury instructions that were presented to jurors orally, the plain-language versions improved comprehension from 45% to 59%, for an improvement of about 31% over the original.<sup>3</sup>
- In another study of some of the same instructions, but this time given orally and in writing, readers understood the plain-language versions "almost fully."<sup>4</sup>
- In still another study of jury instructions — two different sets — plain language improved the level of comprehension from 51% and 65% to 80%.<sup>5</sup>
- In one more study of jury instructions — difficult instructions given orally — plain language improved the level of comprehension from 13% to about 26%, for an improvement of 100%.<sup>6</sup>

<sup>3</sup> Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 *Columbia Law Review* 1306, 1333, 1370 (1979).

<sup>4</sup> Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 *New York University Review of Law & Social Change* 519, 546 (1984-1985).

<sup>5</sup> Amiram Elwork, Bruce D. Sales & James J. Alfani, *Making Jury Instructions Understandable* 45-46 (1982).

<sup>6</sup> Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 74 *Judicature* 249, 250 (1991).



- In a study of medical consent forms, readers of the original form were able to correctly answer 2.36 questions out of 5; on the revised form, they could answer 4.52 questions out of 5, for an improvement of 91%. In addition, the mean response time improved from 2.65 minutes to 1.64 minutes.<sup>7</sup>
- In a study of legislation by the Law Reform Commission of Victoria, lawyers and law students took between a half and a third of the mean time to comprehend the plain-language versions of the legislation, as compared with the original versions.<sup>8</sup>
- In a study of four different legal documents, plain-language techniques reduced the number of reader errors on three of them by about half. On the fourth document, an insurance policy, errors increased. But after further study and revision, including the use of examples (which plain-language experts have long recommended), readers made fewer errors on the insurance policy as well.<sup>9</sup>
- In another study of various legal documents, plain language improved comprehension by 140%, from 15% to 36%, in one test; and by 31%, from 50.5% to 66%, in another test.<sup>10</sup>
- In a study of a mortgage by the Centre for Plain Legal Language at the University of Sydney, law graduates improved their accuracy on the plain-language version by 15%, from 66% to 76%.<sup>11</sup>
- In a study of an office manual concerning an insurance product, staff members were given a fixed time to answer questions using the original manual and a plain-language version. On the original version, they averaged 3.2 questions right; on the plain-language version, they averaged 6.6 questions right, for an improvement of 106%.<sup>12</sup>
- In a 1980 study of an administrative rule by the Document Design Center, inexperienced readers of the original rule got an average of 8.54 questions right out of 20; on the plain-language version, they got an average of 17.26 questions right, for an improvement of 102%. Even experienced readers of the rule improved by 29%. In addition, the average response time improved from 2.97 minutes to 1.62 minutes.<sup>13</sup>
- In a recent study of a tax form by the Document Design Center, the percentage of users who performed well on the revised form increased from 10% to 55%, for an improvement of 450%.<sup>14</sup>
- In his study of legislation, Martin Cutts tested his Clearer Timeshare Act 1993 on superior law students. Their overall performance on 12 questions improved slightly, from 87% correct to 91%. But on one question, central to understanding the scope of the act, they improved from 48% correct to 94%.<sup>15</sup>

[The article in the *Scribes Journal* will include more examples of testing.]

No one doubts that revising documents is subtle work involving many variables, that the variables change from document to document, and that there are limits to the level of comprehension we can expect with legal documents. And I realize that in some of these studies, the level of comprehension remained lower than we would have liked. Certainly, we still have a lot to learn.

<sup>7</sup> David S. Kaufer, Erwin R. Steinberg & Sarah D. Toney, *Revising Medical Consent Forms: An Empirical Model and Test*, 11(4) *Law, Medicine & Health Care* 155, 161 (1983).

<sup>8</sup> Law Reform Commission of Victoria, *Plain English and the Law 69-70* (1987).

<sup>9</sup> Joyce Hannah Swaney, Carol J. Janik, Sandra J. Bond & John R. Hayes, *Editing for Comprehension: Improving the Process Through Reading Protocols*, published in *Plain Language: Principles and Practice* 173, 177, 185 (Erwin R. Steinberg editor, 1991).

<sup>10</sup> Michael E. J. Masson & Mary Anne Waldron, *Comprehension of Legal Contracts by Non-Experts: Effectiveness of Plain Language Redrafting*, 8 *Applied Cognitive Psychology* 67, 75, 77 (1994).

<sup>11</sup> Centre for Plain Legal Language, Paper No. 1, *Surveying a Plain Language Mortgage* 3 (1992).

<sup>12</sup> Australian Mutual Provident, Documentation Quality Improvement Team 10 (1992) (internal study, on file with author).

<sup>13</sup> Janice C. Redish, *How to Write Regulations and Other Legal Documents in Clear English* 43 (1991).

<sup>14</sup> Anita D. Wright, *The Value of Usability Testing in Document Design*, *Clarity* No. 30 (March 1994), at 24, 30.

<sup>15</sup> Martin Cutts, *Lucid Law* §§ 1.7, 8.28 (1994). Cutts did not give a performance test to members of the public. But they strongly preferred the revised version, as did the law students.

But the fact remains that there *is* evidence to show that plain language improves comprehension. What's more, it *is* a substantial gain to move from 5% to 55%, or from 51% to 80%, or even from 50% to 66%. Finally, what no study can measure is motivation — that is, the number of readers who don't even try to understand, say, a traditional mortgage, because they can tell in one look that they don't stand a chance.

### Plain language involves much more than just plain words and short sentences.

The critics flirt with distortion when they characterize plain language.

First, they distinguish between a "text-based" approach to plain language and a "reader-oriented approach."<sup>16</sup> The text-based approach, they say, relies merely on language — words and sentences. The reader-oriented approach relies on testing readers to make sure that they understand the document.

Then we get all the old arguments against text-based guidelines: long sentences can be managed; there can be good reasons to use the passive voice; shorter does not always mean clearer; readability formulas are only a rough measuring device; and so on.<sup>17</sup>

Yes, we know. These are non-issues. Every reputable book and article on plain language recognizes, for instance, the good uses of the passive voice. We regard the language guidelines, the ones for words and sentences, as just that — guidelines, not inflexible rules. And guidelines not only are useful to writers, but are essential to the writing process. All writers use guidelines whether they realize it or not — either explicit guidelines or ones they have internalized.<sup>18</sup>

<sup>16</sup>Penman, note 2, at 122-126.

<sup>17</sup>Id. at 123-124.

<sup>18</sup>Janice C. Redish & Susan Rosen, *Can Guidelines Help Writers?*, published in *Plain Language: Principles and Practice* 83, 86-87 (Erwin R. Steinberg editor, 1991).

The important point is that plain language cannot be confined to the "text-based approach." In one breath, the critics seem to acknowledge this;<sup>19</sup> but in another breath, they speak of "the typical text-based claims of the plain English movement" and "the basic, text-based tenets of the plain language movement."<sup>20</sup> Unfortunately, the critics are ignoring the overwhelming weight of the plain-language literature.

It's true, of course, that not every voice in the choir sounds exactly the same; that some articles are more narrowly focused than others; and that casual observers, including many lawyers, still think of plain language as all about vocabulary, or getting rid of archaic words and complex verbiage. It's also true that the very term "plain language" lends itself to a narrow interpretation. But that interpretation is not accurate, not if you listen to the full choir.

To repeat: the plain-language movement should not be identified with one approach as opposed to another. We have learned from the commentators and researchers, from our own research, and from our work in rewriting documents. And in any number of books and articles, we have set out dozens of guidelines for plain language — guidelines that range over planning, design, organization, sentences, words, and testing.<sup>21</sup>

<sup>19</sup>Penman, note 2, at 125 ("An increasing number of plain language advocates are recognizing the importance of the reader in developing plain language documents.").

<sup>20</sup>Id. at 124, 127.

<sup>21</sup>See, for instance, Centre for Plain Legal Language & Parliamentary Counsel's Office, *Discussion Paper: Review and Redesign of New South Wales Legislation* (1994); Robert D. Eagleson, *Writing in Plain English* (1990); Plain English Campaign, *The Plain English Story* (3d revised edition, 1993); Janice C. Redish, *How to Write Regulations and Other Legal Documents in Clear English* (1991); David St. L. Kelly & Christopher J. Balmford, *Leading the Way in Developing Plain English Documents*, 16(4) *Australian Insurance Institute Journal* 43, 45-46 (1993); Kimble, note 1, at 11-14; Susan Krongold, *Writing Laws: Making Them Easier to Understand*, 24 *Ottawa Law Review* 495 (1992).

In addition, we recognize that the guidelines may vary according to the intended readers and how they will use the document. So for documents that organizations or the larger public will use, plain language involves a process of developing the documents to meet the users' needs.<sup>22</sup>

**The plain-language movement definitely recommends testing documents on readers whenever possible.**

This is another non-issue. We're told that "a proper reader-oriented approach would test the actual documents on potential readers and modify the documents accordingly."<sup>23</sup> But again, the plain-language literature (including all the literature in note 21) is strongly on the side of testing. The Document Design Center has been stressing it for years;<sup>24</sup> in fact, their work has led to a new book, *A Practical Guide to Usability Testing*, by Joseph Dumas and Janice Redish (Ablex Publishing, 1993). The Plain English Campaign, in England, has also been involved in testing for years.<sup>25</sup>

Yet we are still criticized for falling short. For example: "[I]n Kimble's recent review he argues that legal writers must 'design and write the document in a way that best serves the reader.' But he does not say how we can know that the reader is being best served."<sup>26</sup> Wait a minute. What I said, two sentences after the one just quoted, was this: "Whenever possible, test consumer documents on a small group of typical users."<sup>27</sup>

<sup>22</sup>Janice Redish, *Reply to Robyn Penman*, Rapport No. 12 (Summer 1994), at 8.

<sup>23</sup>Penman, note 2, at 126.

<sup>24</sup>Document Design Center, *The Process Model of Document Design*, Simply Stated No. 18 (July 1981), at 1, 4.

<sup>25</sup>Plain English Campaign, *The Plain English Story* 21, 51 (3d revised edition, 1993).

<sup>26</sup>Penman, note 2, at 125.

<sup>27</sup>Kimble, note 1, at 12.

**When testing is not possible, plain language is more likely to be understood and appreciated than traditional legal writing.**

During most of their days, most lawyers are in their offices — writing. They write letters to their clients, letters to other lawyers, memorandums of law, briefs, lawsuit papers of all kinds (complaints, answers, motions, interrogatories, requests for admissions), transactional documents (contracts, wills, trusts, by-laws), and much more. Obviously, most of these documents cannot be tested.

So what should a lawyer do, sitting there in the office without the aid of scientific certainty? The lawyer can still plan the document, that is, still treat it as part of a process. How? Think about who will have to read the document, what the readers will have to do with it, what their motivation is, and what knowledge and reading ability they have. Think about how the document fits into a system of other documents or other activities. (Does it comply with the statute? Is it consistent with the client's other forms and policies?) Show the proposed document to the client and explain the hard parts. Try to make sure that it carries out the client's wishes. These process steps may take a few extra minutes or hours or days, depending on the document, how unique it is, and how difficult the subject is.

In any event, the lawyer must at some point think about design and organization and style. Let's assume that he or she has a choice and is not forced to just order up the formbook model. Let's also assume that he or she has the skill to write in plain language. What should our lawyer do, sitting there in the office? Consider the evidence and the indicators.

First, I listed above the empirical studies which show that plain language improves comprehension. The guidelines that have been developed through research and experience will improve most legal documents. We do not have to start over again with every new document.

Second, I have said that traditional style — legalese — fails all the tests and does not communicate.<sup>28</sup> I cited and tried to summarize 26 pages of detailed analysis by Robert Benson.<sup>29</sup> Despite the sheer weight and variety of that evidence, it was rejected because it was not based on testing of readers.<sup>30</sup> But which way does it point, for the lawyer who is making a choice? Would the critics recommend just settling for the formbook models?

Third, I have cited additional research which shows that readers prefer plain language over traditional style.<sup>31</sup> Readers prefer it by a wide margin; they find it substantively more persuasive; and they assume, ironically enough, that lawyers who use it come from more prestigious firms. But this evidence, too, is dismissed because it does not necessarily prove that readers can better understand what they prefer.

Now, I know that readers can be wrong in thinking they understand something; they can prefer what they might not really comprehend. But here again, where do you suppose the odds lie? If readers prefer version A to version B, which is more likely to be clear and efficient? Which way should a lawyer write?

One other point about preferences. Remember that some legal documents — briefs especially, certain lawsuit papers, and even letters — are meant to be persuasive documents. They go beyond conveying information; they are meant to fairly persuade the judge or the other lawyer or the client that the writer is correct or has the better of the argument. For these kinds of documents, readers' preferences are surely important.

Fourth, just take a look at the daily fare. Go into any law firm or law library. Go to any file or to any set of forms, and you will find stuff like this:

<sup>28</sup>Id. at 23-24.

<sup>29</sup>Benson, note 4, at 531-557.

<sup>30</sup>Penman, note 2, at 125.

<sup>31</sup>Kimble, note 1, at 24-25.

Know All Men By These Presents: That Pierce Corporation ("Pierce"), a Pennsylvania corporation, in consideration of the sum of \$\_\_\_\_\_, and other good and valuable consideration, received in accordance with the terms of a certain letter agreement dated April 7, 1993 by and between Pierce and Blue Avenue Associates, a Pennsylvania limited partnership, receipt of which Pierce hereby acknowledges, does hereby remise, release, and forever discharge Blue Avenue Associates and its successors and assigns of and from all, and all manner of, actions and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims, and demands whatsoever in law or equity, arising out of that certain lease commencing October 1, 1992 by and between Pierce and Blue Avenue Associates, which, against Blue Avenue Associates, Pierce ever had, now has, or which its successors, assigns, or any of them, hereafter can, shall, or may have, for or by reason of any cause, matter or thing whatsoever, arising on or before the date of this General Release, but reserving all rights with respect to the return of the security deposit held by Blue Avenue Associates.

In Witness Whereof, Pierce Corporation, intending to be legally bound hereby, has executed this General Release on April 28, 1993.

Or go down to the local courthouse and pull a file:

BE IT REMEMBERED that on the 30th day of March, 1993, came on for hearing before this Honorable Court the motion of Plaintiff to Supplement XYZ Corporation's Appendix to Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, and this Court being of the opinion that such Motion is well taken and should be granted, does hereby grant the motion of Plaintiff to Supplement XYZ Corporation's Appendix to Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

These specimens are ridiculous on their face. And if you multiply them almost to infinity, you get some idea of what the plain-language movement is up against.

So that no one misunderstands, let me reemphasize the importance of testing public documents whenever possible. We are on the record, and have been.

At the same time, most of what lawyers write are not major public documents. So lawyers are thrown back on themselves, on their training, on their perceptions and judgment, perhaps on an editor-friend. They have to make choices. And the evidence — scientific, impressionistic, and everything in between — strongly indicates that plain language will be better understood and will save time. It is no guarantee and no panacea. But it is the clear choice.

**Ultimately, you must use plain language to write clearly.**

The reason for testing documents is of course to identify problems that readers might have in understanding and using the documents, to point the way toward solutions, and to provide proof that the final version of the document works. During the process that leads up to the final version, the value of testing is mainly negative: it reveals deficiencies. To fix the deficiencies, you will probably need to follow plain-language guidelines. Or at least, you are unlikely to improve the document by violating the guidelines.

When the Document Design Center revised a tax form for the sale of a home, they found that users had the most trouble filling out three items on the form.<sup>32</sup>

First, this item:

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).

<sup>32</sup>Anita B. Wright, *The Value of Usability Testing in Document Design*, Clarity No. 30 (March 1994), at 24, 28-29.

Users did not know what the word *mortgage* referred to, the amount of the original loan on the home or the amount of any loan that the seller might have made. The revised version:

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

This version makes the condition explicit; uses an active construction ("you are providing") with a short, concrete subject ("you"); puts the central action in a verb ("are providing"); puts the most important information ("total amount of the loan") at the end of the sentence; and simplifies the vocabulary ("total amount of the loan" instead of "Face amount of any mortgage, note (e.g., second trust), or other financial instrument").

The second item that caused trouble:

Basis of home sold (see instructions).

Users did not understand the technical term *basis*, and the instructions did not begin by specifying the number to start with in making the calculation. The revised version incorporates a mini-worksheet into the separate instructions; in other words, it uses a kind of example or chart. And the worksheet shows users what number to start with and what numbers to add and subtract; in other words, it puts the information in a logical sequence.

The third item that caused trouble:

Subtract line 9f from line 8a.

Users didn't know what to do if they had not needed to fill out 9f. The revised version includes a sentence that explains what to do in that case.

## 14 Answering the Critics of Plain Language

All these changes follow plain-language guidelines or are consistent with them.<sup>33</sup> Even adding detail, adding words, in certain places is no contradiction. The fact remains that the overall result of using plain language will usually be fewer words.<sup>34</sup>

I don't mean to suggest that every change and technique in every document will find its precise rationale in a plain-language guideline. But I do question the critics when they say of one of their projects that "the Capita forms were not in plain English" and "[p]lain English was nowhere in sight."<sup>35</sup>

As they report it, the Capita project involved highly technical insurance documents. The success of the project "was due to communication research, design methods, testing, project planning and successful negotiation."<sup>36</sup> But there is nothing here that is foreign to plain language, as we established earlier. Next: "The factor which lead to the massive improvements in form-filling by Capita agents [was the use of branching structure, or algorithmic form]."<sup>37</sup> Neither is that technique outside the plain-language literature;<sup>38</sup> in fact, the technique appeared in the literature years ago.<sup>39</sup> Finally, some language from a page of the new Capita forms<sup>40</sup>:

2 Are there any other policyowners?

No  Go to 4

Yes  Give details

[part omitted]

3 Are policyowners:

Joint tenants  Go to 4

Tenants in common  Give % ownership of each

Policyowner 1 %

Policyowner 2 %

First policyowner

as trustee  Go to 4

You decide. Is this plain language? (*Joint tenant* is a technical term, but insurance agents, the apparent users, would understand it.)

I give credit to the Communication Research Institute of Australia for their excellent work, and for pushing our understanding of communication theory and document design. I only wish that, instead of denying that their work is in plain language, they would consider whether they take it for granted.

Let me put this another way: I challenge anyone to systematically violate plain-language guidelines and produce clear legal documents.

Just one thing more.

This article has taken up a debate between those who should be natural allies in the struggle for clearer communication in the law. We are trying to move an entire profession off dead center, after four centuries. The task is daunting enough without overstating our differences, straining over definitions, and setting up unnecessary dichotomies between approaches. We have to give lawyers something they can use — when they write for the public at large, and when they write those hundreds of thousands of individual documents every day.

<sup>33</sup>Kimble, note 1, at 11-14.

<sup>34</sup>See, for instance, Martin Cutts, *Lucid Law* § 1.12 (1994) (his version of the Timeshare Act was 25% shorter); Law Reform Commission of Victoria, *Plain English and the Law*, Appendix 2 (1987) (their version of the Takeovers Code reduced it by almost half).

<sup>35</sup>David Sless, Communication Research Institute of Australia, *Plain English Stories*, Communication News (September-October 1993), at 2.

<sup>36</sup>Id.

<sup>37</sup>Id.

<sup>38</sup>Barbara Child, *Drafting Legal Documents* 378-380 (2d edition, 1992); David C. Elliott, *Innovative Legislative Drafting*, 73 Michigan Bar Journal 40, 43 (1994).

<sup>39</sup>Robert Benson, *Up a Statute with Gun and Camera: Isolating Linguistic and Logical Structures in the Analysis of Legislative Language*, 8 Seton Hall Legislative Journal 279, 296-300 (1984).

<sup>40</sup>Phil Fisher & David Sless, Communication Research Institute of Australia, Occasional Paper No. 10, *Improving Information Management in the Insurance Industry: A Case Study of the Capita Financial Group* 33 (1989). The type size in the example had to be reduced.

## The Balmford-Duckworth Tour of the United States — and Their Message That Plain Language Pays

**Last summer, the United States was rocked by two tours: the Rolling Stones and the Balmford-Duckworth Revival. They were equally awesome.**

**The article below is reprinted from Thomas Cooley Law School's *Benchmark* magazine. Ed.**

If you're looking for a world leader in the international movement to improve official writing, look down under — at Australia. In business, government, and law, Australia is making a determined effort to communicate with its citizens in plain language.

That is the message from two Australian lawyers — Christopher Balmford and Mark Duckworth — who recently toured the United States, visiting law firms, government agencies, and law schools. And they had another message as well: using plain language can produce enormous benefits for everyone.

Balmford is head of the plain-language department at Phillips Fox, a major Australian and Asian-Pacific law firm. Duckworth is director of the Centre for Plain Legal Language at the University of Sydney. On August 3, they spoke at a Krinock Lecture at Thomas Cooley Law School.

Balmford said there's money for lawyers who commit to plain language. First, it can give a law firm a distinguishing feature. He said customers are choosing Phillips Fox because it can write legal documents in clear language. The firm just won two major tenders — from a large life-insurance company and from Vic Roads (the department of transportation for Victoria) — because of its plain-language expertise.

Second, plain language adds value to a client's business. For instance, Phillips Fox rewrote documents for a major Australian firm that provides financing and insurance services to export companies. The policy was so complicated that it created all kinds of problems for the people who administered it. The plain-language rewrite improved consistency and reduced costs, and has even become a user-friendly selling tool. One policyholder, who used the policy every week, said he was glad to see that it now included a particular kind of coverage that he had been buying from someone else for 20 years. "The client was appalled," said Balmford, "because the policy had always provided that coverage." The client has now given Phillips Fox a whole new batch of business.

Balmford admitted that he met resistance from some attorneys in the firm. They weren't convinced that clients want plain-language documents. And they were concerned that nothing be lost in the translation. The first objection has been answered by the new clients. The second objection has been answered through a training program. Phillips Fox is now training every lawyer in the firm to write plainly. They are realizing that plain language involves working carefully with in-house experts and with the client's experts to write documents that are every bit as accurate and precise as traditional documents.

"There are clients to be won and a marketing edge to be gained," Balmford said. "Today, clients are prepared to pay for legal services that are plain. One day, they won't pay for legal services unless they are plain."

Mark Duckworth spoke next and explained that the Centre for Plain Legal Language is a research and business unit within the University of Sydney. Among other things, the Centre is involved in a major study called "The Costs of Obscurity," which is examining how clear communication can help businesses by improving efficiency, reducing mistakes, and increasing public confidence. Duckworth said this is part of the microeconomic reform that is going on throughout the western world.

In its study, the Centre is trying to measure things like the time it takes an organization to answer a call caused by a confusing provision in a document, or the time it takes to send back a form that has been filled out incorrectly, or the extra time it takes to train staff because the internal documents are so poorly written.

Duckworth concluded that plain language offers that rare occasion when "business's demand for efficiency and cost-cutting coincides with consumers' demand to know their rights and understand what they're getting. Plain legal language is a game in which everybody can win."

Sandwiched around their Krinock Lecture at Thomas Cooley Law School, Balmford and Duckworth visited major law firms in Los Angeles, Chicago, Detroit, Grand Rapids, New York, and Washington, D.C. Their tour was covered by legal and general newspapers throughout the country, including the *National Law Journal*, the American Bar Association's *Student Lawyer*, the *Michigan Lawyers Weekly*, the *Detroit Legal News*, and *The Detroit News*.

## 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 on the inside front page)

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 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 standard fee is £600 plus expenses and VAT,  
but an extra charge may be negotiated for long-distance travelling.  
CLARITY's share of the fee is £150.

Please contact the speaker of your choice.



An Excerpt From  
***The Costs of Obscurity: A Discussion Paper  
 on the Costs and Benefits of Plain Legal Language***

Mark Duckworth  
 Director, Centre for Plain Legal Language, University of Sydney

Gordon Mills  
 Director, Centre for Microeconomic Policy Analysis, University of Sydney

The authors are engaged in a study of how to measure the costs and benefits of plain legal language. This is precisely the kind of information that we need.

The excerpt below — “Measurement Issues” — is from the final section of a discussion paper that outlines the study. Here is a brief description of the other sections:

- An introduction that summarizes the reasons for the demand for plain language.
- The nature of cost-benefit analysis.
- A general definition of plain legal language.
- A review of earlier studies, with a conclusion that “although many people want to calculate the savings to be gained from using plain language, they do not know how to.”
- The different types of documents.
- The economic effects that flow from introducing plain language.
- Applying the methodology of cost-benefit analysis.

For a copy of the discussion paper, write to:

The Centre for Plain Legal Language  
 Faculty of Law, University of Sydney  
 Level 6, 175 Phillip Street  
 Sydney NSW 2000  
 AUSTRALIA  
 Phone [+61 2] 225 9323  
 Fax [+61 2] 231 0469

## Measurement Issues

The fundamental purpose of cost-benefit analysis is to compare old and new situations. Accordingly, measurements must be made both before and after the change. The “after” measurements have to be estimated (or forecast) if the change has not been implemented.

### Before and after

Where an organisation is satisfied that it wants to introduce plain language, it is not so important to have the “before” measurements. This is because the organisation *believes* the net effect of the change will have positive value. This is the reason why those few reports that do detail the effects of introducing plain language sometimes have incomplete and even inadequate measures of performance in the old situation.

For research, however, the measurements made before the new situation occurs must be as complete and accurate as possible, so that the researcher can effectively measure the nature and extent of changes arising from using a plain language document.

This implies that any case study done for evaluation purposes must include comprehensive information about the situation which exists before the change occurs. The organisation must prepare new measures and procedures to collect this information if none exist. It must apply these measures and procedures to use of the old documents for a reasonable period before the changed documents are introduced (several months, perhaps).

### Direct effects

The ease of measurement of direct effects — and even the possibility of their quantification — depends crucially on the nature of the specific effect to be measured. For those effects that are direct and mundane, as for example reduced errors made by customers in completing forms, quantification is relatively straightforward. Valuing the costs of such errors is not so difficult either, although it may require more than just counting the number of errors — especially when some of the costs fall on parties other than the organisation which issues the document.

### Indirect effects

At the other extreme are indirect effects. An example is product innovation arising from increased competition. The competition is fuelled, in part at least, by plain language documents that aid and encourage prospective customers to “comparison shop”. But it is difficult to know *how much* of the innovation in production can be attributed to plain language because, at each step in the causal chain, there is the possibility that other factors have also influenced the outcome.

### Measuring the value of effects

Indirect effects such as product innovation may be very difficult to value. However, sometimes a change may be a cost-saving or have some other clearly defined economic effect. In those cases, valuation may be possible, even though the measures obtained may only be approximate.

One implication of this is that a full-scale study might include a comprehensive classification of economic effects, with thought given to how to quantify and evaluate each effect. To understand the kind of work involved in doing this, consider one of the simple, direct effects — reduction in the costs of correcting errors when processing forms. Tables 2 and 3 below look only at the costs incurred by the organisation that issues the form and corrects the responses of the individual. Table 2 lists physical quantities that have to be identified or estimated. Table 3 lists monetary valuations that are needed to estimate the costs of correcting errors.

**Table 2 — Quantification needed to evaluate the costs of correcting errors made in completing a form**

Measure	Comments
Number of errors for each type	<ul style="list-style-type: none"> <li>errors must be classified according to the nature and extent of the activity needed to correct them, so that all types within a category can be regarded as being (roughly) similar</li> </ul>
Physical inputs needed for correction (per error)	
<ul style="list-style-type: none"> <li>staff time</li> </ul>	<ul style="list-style-type: none"> <li>Information should be collected separately for each different staff level</li> </ul>
<ul style="list-style-type: none"> <li>other direct inputs</li> </ul>	<ul style="list-style-type: none"> <li>consumables, such as number of telephone calls</li> </ul>
<ul style="list-style-type: none"> <li>other inputs</li> </ul>	<ul style="list-style-type: none"> <li>office floor-space used to house staff involved in error correction</li> </ul>

**Table 3 — Valuations needed to calculate the costs of correcting errors**

<b>Cost category</b>	<b>Valuations</b>	<b>Units</b>
labour costs	for each staff category: wage rate	\$ each person-hour
	staff on-costs (payroll, superannuation)	\$ each person-hour
other direct costs	office space, valued by building rental	\$ each square metre each year
	depreciation of furniture and other equipment	\$ each staff member each year
	consumables	at unit prices paid
indirect costs	allocation of corporate overheads (to the extent that is appropriate)	\$ each staff member each year

As a further example, consider the diverse effects that may flow from rewriting legislation in plain language. The first and most immediate effect is that professional advisers who use the legislation in their work will save time, and may get a better understanding of it. The first step in quantifying this effect is to estimate how many people read the legislation in a year and how much time they spend on this task, before and after introducing plain language. Time and consequential savings can then be measured by applying values similar to those we have developed in Table 3.

### **Costs of preparing a document**

A cost-benefit analysis also requires quantification and valuation directed to measuring the costs of preparing the plain language document. Keeping records of physical inputs such as staff time is relatively straightforward. But even so, there can be conceptual difficulties. The process of revising the plain language document may result in changes to administrative or other procedures. It may then be difficult to disentangle how much staff time was used in revision of the documents, and how much in changing other procedures. If separation is desired, there is a corresponding difficulty in treating the benefits.

A researcher who attempts to evaluate the net benefits before the event may have difficulty in predicting the amounts of input needed to prepare a document. The same difficulties arise with any non-routine activity. In a full-scale cost-benefit study, the researcher could collect information on amounts of input and develop some rules of thumb, perhaps based on other organisations' experience. However, this may be hampered by inadequate record-keeping of past plain language campaigns.

### **Conclusions**

Quantification and valuation can be taken a long way, with effort and the development of appropriate practices. Again, this treatment is not appropriate for all effects. Effects that cannot be valued or even quantified must be described as efficiently as possible for the decision-maker.

An Excerpt From  
***The Cost of Justice:  
 The Lord Chancellor's  
 Review of Spending on  
 Legal Services***

Published by the  
 National Consumer Council

The Lord Chancellor's Department has announced a fundamental review of spending on legal services in England and Wales. The department has informally sought the views of outside organizations. The National Consumer Council (20 Grosvenor Gardens, London SW1W 0DH) has submitted a 60-page paper, which includes the following.

#### Law making

We consider that to achieve a more simple and cost-effective justice system the Lord Chancellor should look at the process of law-making. The Hansard Society [in a report called *Making the Law*, 1992] recently reviewed the legislative process to look at how the government and parliament produce legislation and to assess whether the system is in need of an overhaul. They took a wide range of evidence. For example, in its report the Comptroller and Auditor General at the National Audit Office is quoted as saying "I do have some concerns about the complexity of recent legislation . . . . We find frequent examples of Departments failing to comply with legislation — not because they are seeking to act improperly but because they too have been confused by the complexities of legislation . . . . If Departments and the National Audit Office find it difficult to interpret legislation, what chance has the man on the street?"

In its submission to the review, CLARITY, the plain language organisation for lawyers, referred to the social and economic reasons for improving legal language: "If laws cannot be

readily understood by those most affected by them the social cost is an increasing ignorance of the law and growing disrespect for the law and those who administer it. Ignorance and disrespect for the law damage the fabric of society. Unnecessarily complex language, redundant words, and language which fails to communicate impose an enormous financial burden on all levels of society." [*Making the Law*, Submission from CLARITY, page 198.]

The Lord Chancellor's department and other government departments should respond to the recommendations in the Hansard Society report and begin a review of law making which will lead to more effective processes and simpler laws. This we believe would be consistent with the spirit of the government deregulation exercise.

Attention has also been drawn to the way in which European Union directives are implemented into UK legislation which often results in conflict between the two. One commentator has expressed his concern over the differences between national laws and the European Product Liability Directive: "[C]laims will continue to be framed under both theories of liability. It is suggested, therefore, that the fact that the two systems continue to exist and that a different result may be obtained in given circumstances, will lead to plaintiffs' lawyers pleading both fault and strict liability in all but the most straightforward of cases. Indeed, it may be negligent of them not to. Accordingly, litigation will in fact increase in complexity, scope and cost."

In its 1992 Annual Report, the Law Commission wrote, "Our task is to make the law more simple and more accessible . . . . Every criminal lawyer and every conveyancer, to take only two examples, knows on a daily basis how much money is spent needlessly by public or private sector organisations or by ordinary citizens, because relevant parts of our criminal law or property law are arcane or abstruse . . . . [N]obody has ever calculated the continuing cost to the nation which is caused when so many people have to work with obsolescent laws." We believe there should be a strong commitment from the government to carry out the Law Commission's proposals that have not yet been enacted.

**A comment from Francis Bennion,  
in a letter to Harriet Hall of the  
National Consumer Council.**

Dear Mrs Hall,

Thank you very much for sending me copies of *The Cost of Justice* and the other material.

I would like to make some comments on the passage in *The Cost of Justice* headed "Law making" since this is my particular area of interest and knowledge. In books, articles etc. I have since 1968 been campaigning for improvements in this area. In that year I founded the Statute Law Society as a vehicle for reform.

The first point concerns a matter on which there is widespread misunderstanding. It is exemplified by the quotation from a report of the Comptroller and Auditor General where it is said: "If Departments and the National Audit Office find it difficult to interpret legislation, what chance has the man on the street?" The truth is that the ordinary citizen should not attempt to interpret what I call raw legislation, that is, legislation in the form it is enacted. Law is an expertise, and it is dangerous for lay persons to think they can understand it by going direct to the source. They may well get it wrong, and that may be expensive for them (as with home-made wills and contracts).

From the experience of half a century in dealing with legislation I would say that what members of the public need is efficient and affordable means of finding out the *effect* of the law in its application to their particular situation. What lawyers and other experts need is improvements in the way the law is presented *to them*. Then they in turn can be more efficient in passing it on to the public. The position is the same as with the medical profession. No lay persons would think they could understand a medical textbook or perform an operation on themselves or their relative. It is the same with the law.

The problem of the impact of EC law is a very serious one, for which there are no simple solutions. It is just one reason why the law must be treated as an expertise. However clear a UK Act may appear to be, the reader needs to be aware that it may be modified or overridden by an EC directive, or indeed by principles derived from elsewhere in our own law. This is all fully set out in my textbooks *Statutory Interpretation* and *Statute Law*.

My next point concerns your extract from the Law Commission Annual Report for 1992. It was with a wry smile that I read the statement "Our task is to make the law more simple and more accessible". The enclosed offprint of my article in the *Statute Law Review* on the Law Commission proposals regarding a new criminal code will show one of the reasons why I am sceptical.

I have great sympathy with the aims of your Council. For many years they have been my aims too. The trouble is that in the field of legislation the problems are exceedingly complex, and there are very few people with the knowledge to see just where the answers lie.

None of the above relates to the need to simplify legal documents, such as forms and explanatory leaflets, which are intended to be read directly by members of the public. Much good work has been done in that area recently, and much more needs doing. The essence of what I am trying to convey in this letter is that reformers must consider the intended *audience*, whether professional or lay, for the document in question. The requirements of each are different, and should not be confused together. If they are so confused, the work of reform can only be hindered.

I am sending a copy of this letter to Mark Adler of CLARITY.

Yours sincerely,

Francis Bennion

## Comments on a New Plain Language Law

Philip Knight

### Introduction

Late last year, the British Columbia Ministry of Consumer Services introduced regulations requiring plain language in consumer motor vehicle leases, the first instance in this province of government action directed towards the unspeakable language of consumer contracts. Given the position I took in my 1993 paper<sup>1</sup> calling for legislation to require plain language in legal documents, I expected to lead the cheers for this regulation. But on reflection, I am ambivalent about it. While I commend what I imagine the Ministry of Consumer Services was attempting to do and I am pleased that this first step has been taken, I find the regulation itself unsatisfying.

I would have preferred that the ministry, in defining "plain language", had placed less dependence on technical criteria and greater emphasis on comprehension. Alternatively, given their decision to rely on technical standards, I would have preferred them to go much farther than they do.<sup>2</sup>

Well, as the song says, "You can't always get what you want".

We should be prepared for plain language to arrive in small, halting steps. This regulation is one of those steps, with value beyond its substantive effect on the consumer law of one

<sup>1</sup> Plain Language Institute of British Columbia, *So People Can Understand: A Proposal For a Law to Improve Legal Writing* (1993)

<sup>2</sup> A ministry official, Barry Bains, told me they were constrained from going any farther by the limited scope of regulation-making power granted in the legislation. I am not convinced. The general regulatory authority in the statute is quite broad, and the government enhanced it last fall with additional specific powers designed to authorize the regulation the ministry had in mind.

province. It provides a focal point for analyzing the principles and mechanics of these laws, a task that is much easier with reference to a particular statute than in the abstract. I hope to begin that task with this comment.

### The regulation

Most of the Motor Dealer Leasing Regulation addresses the content of lease contracts. The "plain language requirements" are brief and set out in section 4:

4. (1) Every lease contract must be written in plain language, in not less than 8 point type, and in a manner which is easily understood by a reasonable person.
- (2) A lease contract must not use more than twice the terms "lessee", "lessor" or "assignee".
- (3) All other references to the parties must be to "consumer", "dealer" or "leasing company" or identify the parties by name, or use the terms "you" and "we" as appropriate.

### The standard of "plain language"

This regulation imposes two types of standards:

1. Subjective standards —
  - (a) The contract must be written in plain language
  - (b) The contract must be written in a manner which is easily understood by a reasonable person.
2. Objective standards —
  - (a) The contract must be in at least 8-point type.
  - (b) The contract must not use the words *lessee*, *lessor*, or *assignee* more than twice.
  - (c) Except for the two permissible uses of each of the forbidden words in (b), the contract must refer to the parties by name or as *consumer*, *dealer*, *leasing company*, *you*, or *we*, as appropriate.

This is an unusual combination. Many plain language laws use a subjective standard, focusing attention on the effect of writing. Those laws appeal to advocates of **clarity of communication**, who want to know that readers will actually understand a document, regardless of whether it conforms to certain technical requirements (however helpful those details might be in promoting comprehension). Other laws use an objective standard, drawing attention to the form of writing. They are preferred by advocates of **certainty of legal position**, who wish to know in advance that a document will be able to survive any challenge that it is not "plain".

This regulation, combining the two tests, may have borrowed from the pattern used by some American jurisdictions in laws governing consumer finance arrangements.<sup>3</sup> Apart from a handful of consumer statutes, it is unusual to see the two approaches used together and, in my opinion, unwise to combine them. The use of a subjective standard renders all possible objective standards redundant on the one hand, and somewhat deceptive on the other. The combination is deceptive because the objective criteria seem to provide the contract drafter with the desired basis for certainty, but against the backdrop of the concurrent subjective test, that appearance of certainty is an illusion. Furthermore, the combination creates a potential for some decision-makers to equate the two tests, leading to the conclusion that "plain language" means "satisfying the objective criteria". Too many people in the legal world already think that way, and we struggle constantly against that simplistic formula. Regulations that reinforce that notion, however inadvertently, undermine all our efforts to advance the better, more effective idea that

Plain language means language that is clear and readily understandable to the intended readers.<sup>4</sup>

<sup>3</sup> See Plain Language Institute of British Columbia, *Legislating Plain Language, Background Data* (1993), at 153. [Some U.S. laws combine very general standards with guidelines that may be considered in determining whether the general standard is met. I'm not so sure that this is a bad idea. Ed.]

<sup>4</sup> Joe Kimble, in a resolution adopted by the Legal Writing Institute, 1992

## The subjective tests

Unfortunately, the general rule is flawed. The statement that "contracts must be in plain language" does little to advance any drafter's knowledge of what standard to achieve when preparing contracts for a client. Outside of a stated context, the expression "plain language" is virtually devoid of meaning. You can require a document to be "in English" or "in Cantonese", because those terms refer to defined bodies of vocabulary constrained by standards of usage and grammar. Not so the expression "in plain language" — there is no defined vocabulary, grammar, or usage to which that term refers. Indeed, the very nature of "plain language", in which meaning is determined by the personality of the reader and the circumstances of the reading, is inimical to the idea of a single fixed and defined body of vocabulary, grammar, or usage. Using the term in a regulation necessarily sends the conscientious drafter in search of an answer to the question, "But what is plain language in these circumstances?" By itself, the expression, especially as used in this regulation, offers precious little advice in answer to that question.

Perhaps recognizing that flaw, the regulation added a second element to the general rule, i.e. that every lease contract must also be written "in a manner which is easily understood by a reasonable person". There are two sub-elements to the test: that the contract be "easily understood" when tested against a "reasonable person".

I applaud the first sub-element. It is the only appropriate measure of comprehensibility for a legal document. However, I have a reservation about the language in which it is expressed. Yes, I suggested the words "easily understood" in my proposed draft legislation, but having considered this further, I prefer the adverb "readily" to "easily". I fear that "easily" could convey the notion of "without effort", an idea that goes too far to be practical. It suggests that the consumer can be a passive recipient of information, when what consumers want is to understand a document if they apply reasonable effort. Further, drafters of plain language laws need to take care with the ideas inherent in "understanding" text. There are many levels of understanding; not all need to be the subject of the policy that this regulation seeks to serve.

Let me use an analogy. As I type this paper at my computer, I understand that I have employed a word processing program, though I don't understand how it translates my keystrokes into the desired results; I understand how to coordinate that software with my machine and its operating system, though I haven't the foggiest idea how the system code is employed by the machine's processor to control electronic pulses corresponding to the letters I strike on the keyboard. The point is, I understand the *practical* aspects of using my computer to type a memo, but I do not understand the *conceptual* aspects of it, in an engineering or information processing sense, at all. Put simply, I understand how to use the computer and software to do my work, but I do not understand how the computer or software work. But then, I don't really need to, any more than a consumer needs to "understand" the technical legal concepts inherent in the lease contract. What they do need to understand is what their obligations, rights, and remedies are. It is this understanding of the practical, rather than the conceptual, aspects of the contract that the regulation should address.

Especially since this regulation is the first of its kind in the province, it needed to offer contract drafters more direction, focusing their attention on the circumstantial nature of language use and suggesting procedures by which they could improve the likelihood that their contracts would be "easily understood", even in the limited sense I have suggested.

There are four critical factors which ought to be examined in determining whether a text is "easily understood":

- 1) **Finding**                      The ability to locate appropriate information within a complex text body.
- 2) **Interpreting**              The ability to decode the symbols and construct meaning from them.
- 3) **Comprehending**          The ability to internalize the meaning of the text in a manner parallel to the author's meaning, and within the systemic and procedural contexts in which the meaning must be applied.
- 4) **Applying**                    The ability to use the meaning of the text appropriately as a tool for problem solving.

All four must be satisfied if the reader is to be able to use the lease contract to identify rights, obligations, and remedies — as well as the processes designed to realize those rights, obligations, and remedies — and to apply those processes in the relevant circumstances. That is essentially what it means for a document to be "easily understood", in a practical sense. The regulation here would have better served the ministry's purpose had it directed the contract drafter's mind to those issues.



**JURICOM**

**JURICOM Inc.**  
Since 1982

**LEGAL TRANSLATION                      DRAFTING**  
**PLAIN LANGUAGE CONSULTING**

**Experts in contracts, finance and forensic medicine**

**French • English • Spanish**

**(514) 845-4834**

**Fax and modem: (514) 845-2055**  
**1140 de Maisonneuve West, Suite 1080, Montréal H3A 1M8,**  
**Québec, Canada**



Obviously, that assessment begs the question, "Understood by whom?" And the answer from this regulation — in the second sub-element — is our old legal friend "a reasonable person". An old friend, to be sure, but an unexpected one on this occasion. A "reasonable person" is not the same as "a randomly selected person" or even "an average person". According to Mellinkoff, this term refers to

the law's hypothetical creature who has what society tends to regard as a normal dose of virtue and acceptable frailty. The *reasonable [person's]* hypothetical action, reaction, or lethargy in any situation is the law's standard of reasonable conduct for real people in similar circumstances.<sup>5</sup>

We are familiar with the "reasonable person" when what is being assessed is the conduct, opinion, assumptions, or even expectations of a person before the court. But in no case that springs to my mind is the test applied to the *ability* of one person to interpret what someone else has done — and for obvious and good reason.

Reasonableness may have much to do with "action, reaction, or lethargy in any situation", but it has little or nothing to do with ability to "easily understand" anything. The most reasonable reader may be mystified by what I have written here. Some highly unreasonable fellows (together, I trust, with some who are reasonable) may find my thoughts delightfully lucid and enlightening. Ability to "easily understand" is unrelated to reasonableness; so the second sub-element of the subjective test is inappropriate.

This choice of words also tends to undo the good achieved by the rest of the test. The obligation that contracts be "in plain language and easily understood" is radical. Before the regulation, drafters could (and occasionally did) say, "Well, *I* understand what it means. If readers have trouble, let them seek legal advice". In other words, each reader bore the burden of making the communication effective. Under the "easily understood" part of the regulation, the writer must ensure that, in general, readers will understand what is written in the contract. Thus,

the regulation shifts the burden of comprehensibility from the reader to the writer of the contract. And I believe that this shift is the very core and essence of plain language.

But the unexpected arrival of "reasonable person" on the scene might well shift the burden of comprehension right back to the reader, by compelling an examination of the reader's "action, reaction, or lethargy" when faced with the leasing contract. Instead of this question — "Can the contract drafter demonstrate that, on average, consumers of leasing services understand this contract when they read it?" — the question has become, "In attempting to understand this contract, did this consumer demonstrate the ability of a reasonable consumer?" I think that moves the focus of judicial concern from the language of the contract to the ability and the effort of the consumer.

A better test would have asked whether the contract could be understood by "the average consumer of leased vehicles", moving the emphasis away from the consumer's effort to understand, and over to the appropriateness of the document for use in the intended circumstances. Equally important, the "average consumer" test would have provided a meaningful basis for business to assess their contracts before using them. It is possible to devise and conduct tests (on all four aspects of understanding) on draft documents, adjusting them as needed to reflect any difficulties consumers have in understanding the draft.

Given the wording of the regulation, effective pre-testing would be difficult. Instead of determining before publication what carefully selected average consumers actually do with a text, businesses and their legal counsel are left to guess at what a fact-finder might judicially estimate to be the reading abilities of an imaginary "reasonable person", relative to the text placed in front of him. And since, as pointed out above, reasonableness has nothing to do with ability to understand text, those businesses and their legal counsel have no more meaningful basis to make such a prediction than the judge has to estimate the reasonable person's reading ability.

<sup>5</sup> Mellinkoff's Dictionary of American Legal Usage (1992), at 540

The wording of the subjective test does not address the issues in a manner likely to yield effective reform of consumer contracts, and it does little to inform or assist businesses and their legal counsel to understand what the regulation actually requires of them. That is regrettable, because subjective plain language criteria offer the best chance for improving the comprehensibility of consumer contracts. The ministry would have better met its objectives with three minor drafting changes:

1. They should have equated "plain language" with being "easily understood", instead of making those separate and seemingly conjunctive tests.
2. They should have used "the average consumer of leased vehicles" rather than "the reasonable person".
3. They should have added a series of sub-issues to be addressed in determining whether a document passes the test.

The resulting regulation might have been:

Every lease contract must be written in plain language that can be easily understood by the average consumer of leased vehicles. The following issues must be considered when determining whether a contract is in plain language: (here would follow an appropriate list).

### The objective tests

The first objective standard, requiring 8-point type, is inadequate. The purpose of a type-size requirement is to ensure that a document is easily readable, i.e. that most adults with average eyesight will have little difficulty perceiving the words on the page. Readability is an essential element in creating comprehensible text. But if you wish to enforce readability by imposing minimum type size, you have to use at least 10-point type as the standard. The ministry appears to know this, for section 5 of this regulation requires every contract to bear a prescribed notice to consumers in "bold 12 point type face". Most adults with average eyesight will have great difficulty perceiving words in 8-point type. By using this test, the ministry permits the use of the deficient 8-point type. So the very regulation

intended to serve consumers by making the contract comprehensible permits the contract drafter to negate those consumer gains by the simple device of reducing text to a sub-readable size.

The second and third objective tests are addressed to vocabulary, the words we use to express ideas. This is also a significant concern in creating comprehensible text. But the issue of vocabulary is much more complex than the drafters of this regulation seem to perceive. Generally, I dislike the Academie Francaise approach to language, involving as it does the prescribing and proscribing of words. Language, being a social instrument, is evolutionary, and we are better served if we permit it to evolve within principles rather than try to restrain it within rules. Ideally, drafters of consumer contracts (or any legal document), bearing in mind their intended readers, will always select commonly understood words and use them in their common meanings. If we must have laws aimed at vocabulary, let them advance that ideal, rather than forbid or require particular words and forms.

Having said that, I acknowledge that the ministry is correct in noting that the *ee/er/or* words of legalese are not well understood by the public. But it is simplistic in the extreme to address the question of vocabulary by singling out three words of this class and banning them. It is absurd to ban them *except* for two uses each! The only acceptable reason to ban words is because they will have no meaning for readers, or will confuse them. If that is not a realistic fear, words should not be banned at all. If it is a realistic concern, it exists no matter how few times the words are used — in which case, ban the words outright. Certainly, the required word list would serve the purpose of the lease contract adequately without *ever* needing any of the forbidden three.

Furthermore, this rule invites, indeed encourages, the drafter of lease contracts to break the "Golden Rule" of legal drafting that calls for consistent use of terms throughout a legal document.

I recognize that the drafter may have thought it helpful to allow these words to be used in a definition of the parties to the lease contract. If that is the justification, it is flawed. I think most skillful contract drafters could easily accomplish that task without using any of these words. But my greater objection to this line of reasoning is that it flies in the face of the nature and function of definitions.

In creating a definition, one could only use the impugned words in either of two functions: as a term being defined, or as part of the definition of another term. It wouldn't likely be the former; why would you define a term which you cannot use again in the document? So I am left with the notion that the regulation permits these difficult words to be used as part of a definition of another term. That is a contrary notion if I ever saw one. The whole point of a definition is to use common, understood terminology to explain the use and meaning of an uncommon expression; that is, the familiar is used to clarify the meaning of the unfamiliar. Here, the suggestion is that the drafter intended to allow the use of poorly understood or misunderstood terms as part of a definition of the parties' names. In other words, the unfamiliar may be used to define the familiar! As Macauley Culkin's character repeatedly asked and answered in *Home Alone*, "Does that make sense to you? I don't think so!"

Furthermore, *ee/er/or* are far from the only forms of legalese that confuse people and obscure meaning; but under the regulation, the lessor (I'm still allowed one more use of that!) is free to mumbo jumbo away in words from the deepest, darkest nooks and crannies of *Black's Law Dictionary*, blithely unconcerned for the rest of the vocabulary of the contract, just so long as he doesn't say *lessee* more than twice. This smacks of a formula for magic incantation, and magic deserves better. At least

Eye of newt, and toe of frog,  
Wool of bat, and tongue of dog<sup>6</sup>

has the twin virtues of being poetic and avoiding legal implications.

<sup>6</sup> Macbeth, Act IV, Scene 1

## Conclusion

A law of this type is presumably designed to further a practical and meaningful government objective, e.g.

We wish to improve fairness for consumers by correcting a defect inherent in the marketplace, a defect which manifests itself in the use of unreadable contracts.

If this was the driving objective, it may still be achieved in a backhanded way and more through the fact of the law than through its substance. I expect that businesses confronted with the regulation will easily meet the objective tests and, having had their attention drawn to the issue of contract language, might go beyond those minor technical requirements, seizing the opportunity to produce a somewhat more readable contract. That seems to be the hope of the government officials responsible for this law. But I remain doubtful. I spoke with the policy analyst who has conduct of this file, and he assured me that

the [leasing] industry has vast resources of their own, lawyers and advisors who know all about plain language, and we certainly have no intention and are not required to help them figure out what they have to do to meet these rules.<sup>7</sup>

The tone of that comment does not bode well for the hope that industry will happily exceed the letter of the law.

Apart from that, the ministry seems to miss a fundamental point: they expect industry to meet certain requirements, but have failed to express those requirements clearly. It is incumbent on the ministry, as the author of the regulation, to express or explain those rules clearly, just as it is incumbent on a business, as the author of a lease contract, to clearly express or explain the requirements they expect consumers to meet. The moral imperative of plain language applies to all who draft legal documents. The ministry's stated position amounts to a refusal to do the

<sup>7</sup> Conversation with Barry Bains, Policy Analyst, Ministry of Consumer Services, December 13, 1994.

very thing they are requiring of others. It delivers an implied message that the ministry isn't very committed to the principle behind their own plain language rule. And that message, intended or not, invites contempt for the law.

"Irony" is the word to describe this effort, which repeatedly takes away with one word what it gave with another. Irony in failing to appreciate that fine words cannot be read if printed in type that is too small. Irony in requiring plain language, but providing no guidance to its meaning. Irony in enacting a

plain language law to protect consumers, but leaving the communication burden on the consumer where it was in the first place. Irony again in examining vocabulary, but resorting to a formula-driven, rule-based approach to word choice. Irony in demanding plain language contracts from business but drafting a law that is a confused mix of incompatible visions of what plain language is. Finally, and most significantly, irony that we have to temper our sense of victory in getting a "first plain language law" with regret that its flaws may undermine the good it was intended to achieve.

**Clare Price**  
LGSM. ALAM. SRD.

offers two 3-hour tutorials  
at your firm or her London studio  
each accredited under the CPD scheme and costing £150

<p><b>SPEECH CLARITY</b></p> <p>Voice production Vowels and consonants Distinctness Audibility Inflection Modulation Stressing Phrasing Basic public speaking</p>	<p><b>PUBLIC SPEAKING</b></p> <p>Voice Production Preparing a talk or speech Phrasing Emphasis Modulation Distinctness Audibility Use of notes Use of visual or audio aids Platform technique Persuasion</p>
---	--

Tel: 0980 620235071 735 3156

## Plain English Campaign Holds Third International Conference

Last October, the Plain English Campaign held its Third International Conference, in Washington, D.C. It attracted participants from around the world: England, the United States, Canada, Australia, South Africa, and Israel.

You have to admire the Campaign for their long and tireless efforts to promote plain language. When someone suggested at the 1993 conference that the movement needed a jump-start in the United States, the Campaign agreed — without hesitation — to help. They have been doing it for 15 years, coaxing business and government, speaking for the public, training writers, and even raising a little ruckus when need be. Two days before the 1994 conference, they shredded documents on the Capitol steps — just as they did years ago in Parliament Square.

Their fight is the good fight that we are all involved in. Ed.

### List of Speakers at the Third International Conference

- |   |  |
|---|--|
| <p><b>Christopher Balmford</b><br/>Phillips Fox Solicitors<br/>"Plain English: What's in it for law firms?"</p> <p><b>William W. Bradley</b><br/>Director of Technical Affairs<br/>Nonprescription Drug Manufacturers Association<br/>"The US approach: Plain English in OTC drug labelling"</p> <p><b>Chief Inspector John Burlin</b><br/>Derbyshire Constabulary<br/>"The thin blue line and the thick red tape"</p> <p><b>Gwendolyn Campbell, TQM Project Manager</b><br/>Social Security Administration,<br/>The Atlanta Project<br/>"Georgia Common Access Project — one stop customer shopping"</p> <p><b>Susan de Villiers</b><br/>African National Congress<br/>"The South African experience"</p> <p><b>Nicole Fernbach</b><br/>JURICOM inc<br/>"The impact of plain language, or lack thereof, on multi-lingual communications"</p> <p><b>C. Edward Good</b><br/>Legal Education Limited<br/>"The Writer-in-Residence Program at Finnegan, Henderson, Farabow, Garret &amp; Dunner"</p> <p><b>Richard Grimes and Christopher Adams</b><br/>Rank Xerox (UK) Limited<br/>"Using plain English to set new standards of clarity in our Code of Conduct and customer contracts"</p> <p><b>Mary Jo Jacobi</b><br/>Head of Group Public Affairs<br/>HSBC Holdings plc<br/>"Banking on plain English"</p> | <p><b>Professor Joseph Kimble</b><br/>Thomas M. Cooley Law School<br/>"Answering the critics of plain language"</p> <p><b>Dr. Dennis Kurzon</b><br/>Department of English<br/>The Hebrew University of Jerusalem<br/>"The linguist's dilemma"</p> <p><b>Professor Nancy Schweda Nicholson</b><br/>University of Delaware<br/>"Language and the law: Plain English for lawyers and its impact on court interpreters"</p> <p><b>Clare Roberts</b><br/>Scientific and Regulatory Affairs Executive<br/>The European Proprietary<br/>Medicines Manufacturers' Association<br/>"The European approach: Good consumer information for medicines"</p> <p><b>Peter Rodney</b><br/>EFTA Court<br/>"Euro-jargon and plain language"</p> <p><b>John Snyder</b><br/>National Vice President for Public Relations<br/>National Association of Chiefs of Police<br/>"Streamlining anti-crime legislation"</p> <p><b>John Stacey and Paulette James</b><br/>The Lord Chancellor's Department<br/>"Communication and the courts"</p> <p><b>Jo Van Doren, Associate Director</b><br/>Document Design Center<br/>"What does it mean to have a plain English document?"</p> <p><b>John Watkinson, President</b><br/>Simplified Communications Group, Inc.<br/>"How can regulations protect consumers when you can't understand them?"</p> |
|---|--|

## Selected Remarks from the Third International Conference

- The "Writer-in-Residence": A New Position in Large American Law Firms, Edward Good
- A Linguist's Dilemma, Dennis Kurzon
- Communication and the Courts, John Stacey and Paulette James
- Making Plain English Documents Effective, Jo Van Doren
- How Can Regulations Protect Consumers When You Can't Understand Them?, John Watkinson

### The "Writer-in-Residence": A New Position in Large American Law Firms

**Edward Good**

One of the speakers at the conference described the beginning of a trend among large American law firms. C. Edward Good, author of *Mightier than the Sword — Powerful Writing in the Legal Profession*, spoke about his new position as "Writer-in-Residence" at Finnegan, Henderson, Farabow, Garrett & Dunner, one of America's largest intellectual property law firms.

"The partners at the firm wanted continual training of associates in the area of persuasive writing. And they recognized that persuasive writing necessarily means clear, concise writing," Good said. After he completed a series of group programs for all 100 associates, the partners asked him to create a program just for the partnership.

Good pointed out that several other firms in the United States have created similar positions. Shearman & Sterling in New York employs Stephen Armstrong. Crosby, Heafey, Roach & May in Oakland, California, hired Clyde Leland to serve as its Writer-in-Residence and Director of Professional Development. Similarly, the Portland, Oregon, firm of Miller, Nash, Wiener, Hager & Carlsen has hired Dr. Karen Larsen as its in-house editor.

At Finnegan, Henderson, the attorneys look on Mr. Good as an on-site resource. "Associates and partners call with questions all the time," Good said. "Often, they will bring me in to edit and rewrite briefs. With their backgrounds in patent law and scientific fields and mine in persuasive writing, we can make a formidable team."

Good stressed that his and similar writing positions in law firms make for good employment prospects for those who study plain language and the law. More and more firms will begin to employ professional writers as they realize the close connection between winning cases and the ability to write clearly and concisely.

"Really and truly, those at the top of the profession already realize that legalese is a dead language," Mr. Good concluded. "It just fails to compel. Judges aren't impressed. When the profession wakes up and realizes this fact of life, lots of lawyers will have to remake their writing styles."

## A Linguist's Dilemma

Dennis Kurzon,  
The Hebrew University of Jerusalem

Dr. Dennis Kurzon, a linguist who has for some years carried out research into legal language, talked of a dilemma of his as a linguist. Modern linguistics, as it has developed in the twentieth century, has adopted a number of principles to effect a break from previous approaches to the study of language and languages. Some of these principles seem to run counter to what plain-language supporters are attempting to do. One such principle is descriptivism: the linguist sees his or her task as describing language phenomena, and explaining them from either a cognitive psychological or a sociological perspective. That is, the linguist's job is to describe what language *is* and, possibly, why it is like that. This is opposed to the traditional prescriptive approach, adopted in the past by school grammarians, and at present by teachers of style, by language teachers (out of necessity), and by plain-language practitioners — many of whom claim to state how things *ought* to be.

But, Kurzon went on, despite the apparently opposing viewpoints, a number of issues may arise which may have interesting implications for linguistics.

The first issue he brought up is that the language in which documents and other legal texts are written may be intricate because it reflects the complexities of the legal situation. As Francis Bennion writes in *Clarity* 27, page 19: "obscurity in legislation is very often caused not by unnecessary complication of language but by complication (whether unnecessary or otherwise) of thought". If this is the case, the solution is not in the language used, but in the legal concepts involved. Kurzon then presented a contrary viewpoint, known as the Sapir-Whorf hypothesis, a strong version of which states that language determines thought. This would imply that complex language as used in legal documents leads to the intricacies of these documents. In order to generate change, social — in this case, sociolinguistic — engineering is perhaps necessary; but the initiative to change the

situation must come from those who are professionally involved in the field — the lawyers themselves.

Kurzon then turned to a linguistic issue which is central to the use of language in the legal field, although its discussion by lawyers leaves much to be desired in terms of sophistication. The topic is ambiguity, which should not be considered, as Reed Dickerson once said, "a disease of language", but as a natural phenomenon of any language. A balance is needed between the speaker's need for brevity and the hearer's need for redundancy. That is, the speaker does not have to say so much and expend energy, applying as it were the so-called principle of least effort. On the other hand, repetition and the use of synonymy may ensure that the hearer fully understands the message. Ambiguity is inherent in language, but words and phrases may be disambiguated either by editing or, more frequently, by pragmatic considerations (the context in general).

Kurzon concluded his talk by discussing three types of ambiguity:

1. structural, e.g. "a small girls' school", which could mean either a small school for girls, or a school for small girls, depending on whether *small* modifies *girls* or *school*.
2. pragmatic, e.g. "the chicken is ready to eat", which could mean that the chicken has been cooked, or that the chicken is running around looking for food. This may be compared to the sentence "The zebra is ready to eat", which can only mean that the zebra's feeding time has arrived, since, at least in western cultures, we don't normally eat zebras.
3. multiple ambiguity, e.g. "The boy watched the girl in the park with a telescope", for which the speaker presented six interpretations, and a further two were suggested by members of the audience.

What Dr. Kurzon calls structural, or syntactic, ambiguity does produce a good deal of unnecessary litigation. Ed.

## Communication and the Courts

### John Stacey and Paulette James The Lord Chancellor's Department

The Lord Chancellor's Department were represented by Paulette James and John Stacey. James explained that they had begun work by reviewing the information provided for unrepresented court users. They had found existing booklets far too long and making the common mistake of trying to cover every possible eventuality. Using a combination of plain English and good design, they replaced the booklets with a series of illustrated leaflets, each covering a discrete area of procedure. This meant that readers need not read the whole series, but only those which applied to their particular case.

The effectiveness of the leaflets helped blaze the trail for the introduction of prescribed forms drafted in plain English. The leaflets and forms have also led to a more general commitment to improve the way the Department gets its message across. The effect has been to encourage people to come to court hearings to give their version of events: previously they had stayed away. There has also been a substantial improvement in the number and quality of written responses to court documents.

John Stacey talked about the hidden costs of poor communication. He explained how a form which is poorly designed can raise more questions than it answers. The result is that staff time is taken up answering those questions which the form should have answered in the first place. He said that replacing the information booklets with leaflets has reduced the amount of staff time spent in answering questions from the public. He demonstrated that if an average of 4 hours a day in staff time has been saved in each of the 270 courts, the cost benefits to the organisation would be 2.7 million pounds (\$4.1 million US).

Stacey explained that good design improved clarity and gave forms an appropriate authority. Using "before" and "after" versions of one form, he explained how the redesign improved responses in the form of debt repayment rates from 5% to 20%.

Finally, James explained that the future in the Department promises more moves towards improving communication. Successive committees and reviews have called for more plain English documents and rules. There is now a will to change amongst the judiciary, court staff, and the legal profession. This is bolstered by the latest committee chaired by Lord Woolf. Two of his aims are to produce a single set of procedural rules for the High Court and county courts in plainer English, and to reduce the number of court forms.

## Making Plain English Documents Effective

### Jo Van Doren, Document Design Center

**The speaker converted her remarks into a short essay for *Clarity*.**

How effective is a document that is written in plain English? What does it mean to have a plain English document? How do we know if a plain English document really works?

Creating a document in plain English requires more than writing short sentences and simple words. The following is an example of a simply written, easy-to-understand sentence from a sign at the front of a small commuter plane enroute to Ohio.

Please contact a crew member if you are not able to read, speak, or understand English, or are unable to understand the graphic directions or crew commands.

Plainly written? Yes. Easy for the user? Yes, if the user reads or speaks English. But the intended users, people who need to know this information, are people who do not read or speak English. For them, this sign may as well not exist.



A plain English document that is effective is one that meets the needs of its intended users. It means preparing information so that the audience for whom it is intended will find what they need, know what it means, and understand what they need to do. To make a document effective requires thorough analysis, writing, designing, testing, and revising. And if it is a living document, such as a government form that will change due to new statutes and regulations, it also means retesting and revising throughout the life of the document.

In the example above, only part of this process was followed in developing the sign. Some analysis was probably done to determine the reason for the information in the sign. The writer made sure the information was concise and to the point. The writer used color and bold lettering to make the information stand out, and then proofed it. Here is where the process probably ended — because if the sentence had been tested with the intended audience, the results would have shown that the sign missed the mark. Even without testing, simply going over the purpose of the information would have made someone notice that there was a serious flaw.

Sometimes the problems people have with understanding information in a document is not limited to the document itself. The document could be part of an entire system of documents or procedures that is problematic. It may be that the complexity of the procedures is the problem. In some cases, it's the equipment that the documentation supports that is causing the problem. Without understanding users and determining exactly what they'll need to do with a document, you will not be able to produce a useful plain English document. For example, simplifying the language in a tax form will not necessarily solve the problems taxpayers have with filling out their tax forms. In a project to rewrite and redesign the Internal Revenue Service's Form 2119, we began by asking numerous questions and collecting vital information from the users and from the Internal Revenue Service. We also knew that we would have to find out if our rewritten and redesigned documents were any better by testing them with the actual users using typical scenarios, performance tests, and comprehension tests. Steps to redo the form included

1. analyzing the form line-by-line to identify problems that affect readability, usability, and presentation of the information;
2. identifying all the decisions taxpayers make in order to complete it;
3. interviewing professional tax preparers to find out what problems they had with the form and what problems they thought taxpayers had; and
4. testing the form with typical taxpayers to find out what they found confusing about the form.

As one example of the importance of testing documents with actual users, we would have missed an important problem with the 2119 concerning "fixing up expenses" and "capital improvements." On the surface, these seemed easy to define, but depending on when changes (such as painting a kitchen or installing new living room carpeting) were actually made, categorizing these changes became very confusing. Without testing, we would have missed the confusion and the subsequent errors.

To make plain English documents effective means following a process that requires dedication and commitment from all who are involved. And the payoff is a measurable impact on both productivity and user satisfaction.

## How Can Regulations Protect Consumers When You Can't Understand Them?

**John Watkinson, President,  
Simplified Communications Group Inc.**

The way in which regulations about the disclosure of information often interfere with effective communication was the topic of John Watkinson, president of the Toronto-based Simplified Communications Group Inc.

To illustrate his point, he cited the example of an insurance policy his company revised that required approval by insurance regulators in 50 jurisdictions in the United States. "The hurdle of regulatory approval seems so high, and the potential penalties so great," he said, "that companies often shy away from making changes, even though those changes would better serve the goals of the regulator and the needs of the consumer."

Watkinson said that legislation and regulations required the insurance policy his company worked on to have the following terms on the front cover with virtually no explanation: *policy schedule, initial face amount, additional insurance rider face amount, guarantee period, insurance benefits, cash value benefits, cash surrender value, investment base, investment divisions, variable universal life insurance, flexible premiums, and non-participating*. "If you have ever sat behind the one-way glass in a research project and watched as consumers are probed on their understanding of life insurance," he said, "you know that most people have no idea what these terms mean."

Ultimately, Watkinson said his client was faced with two choices: to use the existing policy wording, even though it was tremendously confusing for most people; or to adopt his proposed new wording, risk incalculable delays, and have the eventual prospect of a wholly unwieldy and impractical number of state variations. Watkinson couldn't fault his client's decision to stay with the tested version. But in this sort of regulatory environment, he asked, "Who speaks for the consumer?"

To help avoid the sort of situation he had described, he cited an initiative his company is taking for a Canadian client, in this case a finance company. Currently, the context in which the consumer is given information that has to be disclosed by finance companies ensures that it gets little if any attention. Watkinson said his company was meeting with one of the provincial consumer-protection offices responsible for regulating finance companies. "Our message is simple: let's work together to figure out a better way to make sure consumers know what they're getting into."

His company planned to propose to the regulator that information which had to be disclosed to the consumer be rewritten in plain English and presented in a format that would help it to be easily understood. Watkinson said his group would develop a number of different approaches, then do some testing with consumers to see which one works best. "Our client will fund this activity, and will hopefully be the first to benefit if the experiment results in regulatory approval for a new and more enlightened approach," Watkinson said. The new approach would combine disclosure with effective communication. "Not only do you give the information," he said, "but you do so in a way that gives the consumer the best chance of understanding it."

John Watkinson has worked in communications for 30 years in the United Kingdom, the United States, and Canada. He founded Simplified Communications Group in 1992 to specialize in making complex information easy to understand. The company, which has a full-time staff of 11, uses plain language writing and information design, backed by systems, legal, and research skills.

## News from Around the World

### Australia

#### New National Group — Plain English Plus

We are delighted to announce that we have a strong and growing membership of 25 lawyers and document designers (principally lawyers who work for the major national law firms). We almost have a logo, a name-play on letters in plain English plus.

We have a charter which was accepted at the last meeting. The charter provides:

#### Who are We?

PEP is a group of people who want to bring the benefit of plain English plus to the world. Our skills include law, communication, language, research, and management. We are happy to welcome new members from all disciplines and backgrounds.

#### What are the benefits of plain English plus?

We believe that the benefits of plain English plus include:

- improving access to information and the law by enabling users to better understand and find out about their rights and obligations
- improving business and government efficiency and effectiveness
- improving the legal profession's image.

You can advertise in  
*Clarity* for as little as  
£15 an issue.

Please contact Mark Adler.

## What is plain English?

Plain English involves:

- thinking clearly
- making sure documents meet the needs of the users
- using language, organisation, and design to communicate the information to the users
- being culturally appropriate
- testing documents during the writing process to improve them and to make sure that users understand and can use the information
- more than just documents: the processes and context in which the documents are used must also be reviewed and improved. Plain English plus is a vital part of improving the way organisations do things.

## What are PEP's aims?

For the community and the economy we aim:

- to help and encourage the public, business, government, and the legal profession to
  - understand the principles of plain English plus
  - appreciate the benefits of plain English plus
  - seek plain English plus for the people who write their communications
  - apply the principles of plain English plus when they write
- to pursue and promote excellence in communication
- to encourage reform in communication
- to be a contact and referral point for people who want to know more about plain English plus.

For ourselves, we aim:

- to encourage, support, and exchange information between members
- to create a forum to develop skills in plain English plus
- to create a forum to explore and develop theoretical and practical issues involved in plain English plus.

We are hoping to have a major public launch, using the Supreme Court Library or some other suitable red-velveted premises, in March 1995. We propose to continue having monthly meetings (apart from the summer shut-down) at which we handle administration, encourage the organisation, and have a half-hour seminar on a topic on mutual interest.

We are asking for a modest subscription fee of \$20 from our members, which will be put towards the administrative overheads of the group. We are going to ask one of the major publishers in Australia to sponsor a newsletter, which we hope will have dual editors in Melbourne and Sydney.

Our idea is to build national knowledge and understanding of the plain English movement.

Contact: Plain English Plus  
c/- Jude Wallace  
226 King Street  
Melbourne 3000  
Tel 03 642 4022  
Fax 03 642 4054.

## Canada

### New Plain Language Section in British Columbia

According to the Summer 1994 issue of *Rapport* (a Canadian-based newsletter), the Canadian Bar Association has established a Plain Language Section in British Columbia. The Section is charged with carrying out the recommendations in *The Decline and Fall of Gobbledygook*, a 1990 report by a joint task force of the Canadian Bankers' Association and the Canadian Bar Association. The first chair of the committee is Cheryl Stephens, who is also the managing editor of *Rapport*. For more information about *Rapport*, write Stephens at The Precedent Group, P.O. Box 48235, Bentall Centre, Vancouver, British Columbia V7X 1A1.

## England

### Lift-off of Clear English Standard

After only five months, the Plain Language Commission reports that its Clear English Standard accreditation mark is being used on 320 documents, including pension and investment contracts and tenancy conditions. An organization's first use of the Standard is free of charge. For a leaflet explaining the scheme, contact Diana Sheffield, Plain Language Commission, 69 Bings Road, Whaley Bridge, Stockport SK12 7ND, UK. Tel 01663 733177, fax 735135.

## Europe

### European Association of Legislation, Newsletter No. 1

The Board agreed to give members from time to time a very simple newsletter about EAL activities.

#### 1. Second Congress of the EAL

The Camer dei Deputati in Rome could not maintain EAL's planning for the 2nd Congress in Rome by end of this year. The recent elections in Italy and new situation in the management of the Chamber Administration required new decisions for almost everything, including our Congress.

However, our friend Dr. Palanza is now in a position to invite us for the second EAL Congress, 24-25 March 1995 in Rome. The schedule did not change. So we'll discuss "National Legislations in the European Framework."

Invitations will be mailed out shortly.

## 2. Publications

The proceedings of the EAL founding symposium in Bad Homburg are now in print and will be available as Volume 1 of the EAL publications (Nomos publisher, Baden-Baden) within six months.

The proceedings of the first EAL Congress in Liège in September 1993 will be published in a simple and quick way as a brochure soon — edited by Professor Delnoy of Liège — and as Volume 2 of the EAL publications in 1995.

A Russian version of the Liège proceedings, which have been devoted to basic issues of methodology of written law, has been prepared by our friend Dr. Lafitsky in Moscow and will be distributed in Eastern European countries that establish their legislatures and legislative processes during these days.

## 3. Other Reports

Short reports of the Liège Congress have been published in

- Gesetzgebung huete (CH), 3/1993,
- Legislação (Port), No. 8/1993,
- Zeitschrift für Gesetzgebung (Germ), 1/1993,
- Statute Law Review (UK), Vol. 15, No. 2.

## 4. Board Activities

The Board met on 5 February 1994 in Goeteborg. Board members have been active as consultants in issues of legislation and the law. Dr. Marta Tavares, in June 1994, lectured in Bukarest on behalf of the Council of Europe on the "Process of Drafting Laws" before an audience of the Ministry of Justice of Romania. Björn Edquist worked as a legal adviser to the Ministry of Justice, Vietnam. Professor St. John Bates took part in a Commonwealth Law Conference in Ottawa (Canada). The chairman in March and November 1994 did some consultancy in drafting the interim and final constitution and organizing the Ministry of Science and Research of South Africa.

## 5. Call for Information

A newsletter can only be as interesting as the information from its members. The Board kindly asks every member to contribute

- in circulating information of conferences, seminars, and other events in the field of legislation;
- in drawing attention to articles, books, and "grey materials";
- in informing about teaching activities in legislation — in universities and institutions of administration;
- in making suggestions for new members to be approached and other personal information;
- in reporting about activities of the National Associations of Legislation.

Received from Prof. Dr. Ulrich Karpen,  
Schlüterstraße 28, D 20146 HAMBURG

Tel: +49 40 4123-3023 or: + 49 40 4123-4514  
Fax: + 49 40 44 78 54

## United States

### Plain English Committee, State Bar of Michigan

The Plain English Committee of the State Bar of Michigan is still going strong after more than ten years.

For the last several years it has been sampling and grading (roughly) the quality of legal documents in Michigan. The Committee has looked at selected government and business documents in five categories: laws; lawsuit papers; real estate; other contracts; and wills and trusts. As part of that effort, the Committee has been giving Clarity Awards, which have received some attention in the local and national media. For 1995, the Committee has announced these awards:

- The National Bank of Detroit, for a credit-card application.
- Lou Kasischke, a Michigan lawyer, for an employment contract.
- The Probate and Estate Planning Section of the State Bar, for a statutory will.
- The Health Care Committee of the State Bar, for a patient-advocate form.

The Clarity Awards are meant to recognize progress. The documents may not be perfect, but they take a step in the right direction.

Finally, in January 1994, the Committee produced an issue of the *Michigan Bar Journal* that was devoted entirely to plain language. The issue included articles by several members of CLARITY: Joe Kimble, Jo Van Doren (Document Design Center), David Elliott, Robert Eagleson, and Edward Kerr.

### Legal Writing Committee, American Bar Association

There is a good chance that the 1995 annual meeting of the American Bar Association will include a program on plain language, sponsored by the Legal Writing Committee. The Committee has several members who met with Chris Balmford last summer during his tour of the United States, and they were inspired by events in Australia. A possible title for the program is "The New Plain Language" ("new," because many lawyers still think that plain language is all about getting rid of archaic language — and no more).

For many years, the American Bar Association has been imploring law schools to improve their legal-writing programs.

- A 1979 report recommended three years of writing in law school.
- A 1987 report said, "Legal writing is at the heart of law practice, so it is especially vital that legal writing skills be developed and nurtured through carefully supervised instruction."
- A 1994 report called "Just Solutions" said,

One theme that arose with regularity at the Just Solutions conference was language. In its simplest form, it found its expression in questions such as 'Why can't lawyers speak and write in simple declarative sentences?' Again and again, public delegates spoke of widespread public failure to understand the courts, the strange language that is spoken there, and the law's mysterious processes. . . . A just solution would be [creating] Plain English committees in every state bar association and charging them with rooting out unneeded legalese wherever it occurs.

The plain-language program has now been confirmed for August 6 at the American Bar Association's 1995 meeting in Chicago. (More details in the next issue of *Clarity*.) Chicago is a great city to visit. Classic architecture. World-famous museums. Wonderful shopping and night life. Major-league baseball. And home of the city blues. Ed.



### New Consumer-Contract Law in Pennsylvania

We have a report from Roseann B. Termini, who is Senior Deputy Attorney General in the Pennsylvania Office of Attorney General.

In June 1994, Pennsylvania became the ninth state to require plain language in certain consumer contracts. The others: Connecticut, Hawaii, Maine, Minnesota, Montana, New Jersey, New York, and West Virginia. The Pennsylvania statute specifically states that it is intended "to promote the writing of consumer contracts in plain language." 73 Pennsylvania Statutes § 2202(b).

The statute applies to a written agreement between a consumer and a party acting in the usual course of business, made primarily for personal, family, or household purposes in which a consumer does any of the following:

- Borrows money.
- Buys, leases, or rents personal property, real property, or services for cash or on credit.
- Obtains credit.

However, the statute has some notable exclusions:

- Real-estate conveyancing documents; deeds and mortgages; and title insurance contracts.
- Consumer contracts involving more than \$50,000.
- Marital agreements.
- Contracts to buy securities.

- Documents used by financial institutions that are subject to supervision by federal or state regulatory authorities.
- Contracts for insurance.
- Commercial leases.

So what's left? The statute still applies to residential leases, retail installment-sales contracts, home-improvement contracts, consumer rental-storage contracts, and motor-vehicle leases.

The statute requires that contracts be "written, organized and designed so that they are easy to read and understand." In deciding whether a contract meets this general requirement, courts must consider a series of language guidelines, visual guidelines, and consumer restrictions. The consumer restrictions require that the contract include a description of any property that the consumer could lose, or any contract waivers of the consumer's rights in residential leases.

For a violation, the statute allows one or more of these remedies:

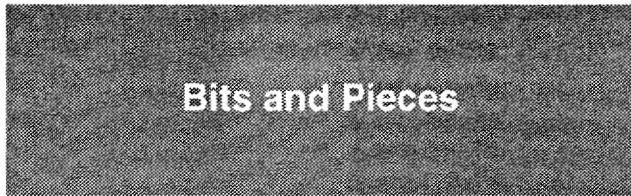
- Compensation equal to the value of any actual loss.
- Statutory damages of \$100.
- Court costs.
- Reasonable attorney fees.
- Any other relief ordered by the court.

A contract may be submitted to the Attorney General for preapproval. The Attorney General has prepared a packet that includes a copy of the act, the process for preapproval, a checklist that reflects the guidelines for readability in the statute, and illustrated examples of the guidelines.

As of January 1995, the Attorney General had sent about 700 packets and received about 300 applications for preapproval. Most of the contracts are for residential leases. The others vary widely: retail installment-sales contracts, consent for medical treatment, pre-need funeral contracts, and more.

For more information, contact:

Roseann B. Termini  
Pennsylvania Office of Attorney General  
Bureau of Consumer Protection, 14th Floor  
Strawberry Square  
Harrisburg, Pennsylvania 17120



**Committee News**

These are some of the topics the committee is discussing. If you have any comments on these topics or suggestions for other items to consider, please contact Justin Nelson or any committee member. We would greatly value your views.

**The Woolf review of the civil justice system**

We have joined the list of prospective consultees (is there such a word?) for this. We should receive consultation documents as the Board issues them. Initially, the committee will consider these, but may call upon other members to help in preparing responses as appropriate. The most relevant area is likely to be the review of the rules of court. If you are interested in this, please tell us.

**Change of Chairman**

At the Annual Meeting and supper in October, Mark Adler retired from his post as Chairman, and I was appointed in his place. Mark remains editor-in-chief of the Journal, though guest editors are being invited to take over for some individual issues.

Ever since he joined CLARITY, Mark has been a stalwart supporter and, as Chairman, he has done more than any predecessor to raise CLARITY's profile in the legal profession, in academic circles, and amongst the public generally. As well as running CLARITY extremely efficiently, and adopting a very pro-active attitude in this, he has promoted CLARITY's aims through the publication of his book (*Clarity for Lawyers*) and through his plain drafting seminars.

Understandably enough, he wants to reduce the burden of his CLARITY work, without by any means losing touch, and his retirement as Chairman has provided an opportunity to introduce new blood in the form of Nick O'Brien, who is now Treasurer. As well as continuing as the Journal's resident editor, Mark remains on the committee and is still fully involved in the organisation's plans and activities.

On behalf of all members, I thank Mark for the immense amount of work he has done in the past, and trust he will continue his enthusiastic support long into the future.

**Plain English precedents**

Mark Adler is preparing a book of plain English precedents for commercial publication, giving due credit to CLARITY's role. Again, if you are willing to offer precedents, please tell us.

**Clarity Mark**

We are considering the possibility of awarding a "Clarity Mark" to firms and individuals who practise what CLARITY preaches. Planning is at an early stage, but I hope to let you have firm details in the next issue.

We had considered awarding the Mark for specific documents, but various practical problems arose: if we approve a standardised document (say, a lease), we could not check on the clarity of the variable text that might be inserted; would minor revisions require fresh approval from scratch? Also, we were concerned over the (probably remote) chance that an "end user" might claim against CLARITY if the legal effectiveness (as opposed to the style) of the document was not up to scratch.

We decided instead that it would be both safer and more useful to encourage those who follow CLARITY's aims to flaunt it on their letterheads — an added benefit being that such a system would be largely self-policing.

**ISO 9000/BS 5750**

This Standard can be a means of encouraging the use of clearer language. We therefore intend lobbying BSI to this effect in time for when they next revise the Standard.



## Bar Conference and Law Society Conference

We are investigating the possibility of running workshops (or similar) at each of these conferences in 1995 to promote CLARITY and its aims. If we are successful in winning a slot, further details will follow.

### 1995 Clarity Awards

Sponsored by D.J. Freeman (who recently won the *Estates Gazette's* plain language competition), these awards are intended to demonstrate and recognise good communication by lawyers, and highlight poor examples. Open to all lawyers, entries from CLARITY members would be particularly welcome. Full details appear elsewhere in this issue.

### Committee meetings

We hold these approximately every two months, at the home or office of a committee member. Non-committee members are welcome to attend if they want to observe or take part in the discussions. If you cannot attend a meeting, your views and suggestions are still welcome.

The next meeting will be in central London on Saturday 8th April, starting at 10:30am and ending by 1:00pm. If you want to attend, please speak to me.

## Annual Meeting and Supper

We feel it is time to change the format of the annual get-together, and suggest a three-stage format.

- 6.00pm to 6.30pm: a short formal business meeting
- 6.30pm to 7.30pm: a lecture, talk, or discussion
- 7.30pm onwards: supper, similar to previous years

Members could attend one or more parts of the evening without feeling obliged to attend all.

The event is likely to be held on a Friday evening in central London.

### BACK NUMBERS

of *Clarity* are available at the following prices:

Issues		
1-4	£1	each
5-11	£1.50	each
12-24	£2	each
25-31	£3	each

### CLARITY TIES

are available at £8.50 each

**1995 Clarity Awards —  
Sponsored by D.J. Freeman**

**The awards**

The awards will recognise lawyers who —

- use modern language
- set out documents clearly
- generally make sure they communicate efficiently and effectively

Through the awards, CLARITY and D J Freeman hope to demonstrate to lawyers and public alike the benefits of clear communication and accurate use of plain language.

We will reward the authors of the best examples and the suppliers (who need not be the authors) of the worst examples.

**Entries**

Entrants may submit as many items as they want. Entries can be any legal documents (agreements; orders; Articles of Association; deeds; pleadings; judgments; debentures; etc) or explanations (client care/Rule 15 letters; news-letters to clients; letters of advice) in any field of law. The important element is the clear communication of what would otherwise be complicated or difficult.

**CLARITY recognized in *Hansard***

The following remarks were made by Lord Henderson of Brompton in the House of Lords on December 14. He is commenting on CLARITY's submission to the Hansard Society Commission on the Legislative Process. CLARITY's submission was prepared by David Elliott. It appears in *Clarity* 25-28 and in the Commission's Report, called *Making the Law*, pages 192-216.

I wish to say a brief word about the delightfully written Memorandum 18 entitled "Clarity". I wish to know who or where is Clarity? What is she — or is that an official secret? The memorandum was so well written that I think it should be published as a separate paper. The excellent memorandum discusses the use of purpose clauses, and recommends them. I was disappointed not to see that endorsed in the recommendations of the Hansard Society Commission. Purpose clauses could reduce exceptional resort to *Hansard* by the courts.

**Procedure**

Entries should be sent to D J Freeman by 21st April 1995.

CLARITY and D J Freeman will present the awards at a ceremony at the Law Society's Hall in London on the evening of 23rd May 1995.

Entering the scheme —

- gives us the right to publish the names and details of the entrant and all or part of the material submitted.
- is confirmation that use of the entry does not breach any confidence, professional ethics, or copyright.

**Contact details**

Please address all enquiries and entries to —

D J Freeman (ref: Clarity)  
43 Fetter Lane  
LONDON  
EC4A 1NA  
(DX: 103, London)

**Small world. The Plain English Committee of the State Bar of Michigan has been giving Clarity Awards since 1992. See *Clarity* 27, page 3. For international readers, perhaps we will call ours the Michigan Clarity Awards, so as not to confuse them with these new and improved CLARITY Awards. In any event, you can't have too much clarity. Ed.**

## **The Missing Link: Bringing the User Into the Information Lifecycle**

**This is an excerpt from "Focus on Information," a new client newsletter by Information Management & Economics, Inc., in Toronto, Ontario. The president is Mark Vale.**

Analyzing information needs and collecting information is the beginning of the information lifecycle. For most organizations, the primary means of collecting client information is through forms. However, the client is often left out when analyzing information needs in forms design. Using a plain language approach to forms design brings the user into the process, and ensures more effective and efficient management of information resources.

Client forms are critical to developing information in all organizations. The information becomes the basis for the delivery of services or products. Inaccurate information means increased costs to the organization.

Organizations have become very adept at dealing with deficient forms, but the resulting costs are significant. In one government registry it was estimated that it took ten times longer to handle a form with errors on it than to handle a form with no errors. The extra time was spent following up with the clients to obtain the correct information. For example, if the error rate on the forms was 20 percent, the registry was spending more than 70 percent of staff resources correcting errors.

How can plain language help? A plain language approach to forms design treats the process of collecting information as a dialogue with the user. Research has shown that by constructing the form as a communications dialogue, errors are reduced and clients find completing the form easier. By developing plain language forms, the British Columbia Small Claims Court was able to handle a 40% increase in case load with the same staff resources.

Usually the process of forms design starts from the point of view of the organization and what information must be collected. The data elements are assembled based on operational, policy, and legal considerations. The design is often based on the needs of data processing systems. Plain language forms design, on the other hand, focuses first on the user and matches the user's needs with the needs of the organization.

A key part of plain language forms design is testing the form for usability and readability before the form is finalized. This testing ensures the form will effectively collect the right information.

By bringing the user into forms design, organizations can collect accurate information early in the information lifecycle.

## Top of the Form

This article about Mike Foers appeared in *Communication Europe*, the journal of the Federation of European Industrial Editors.

*Fear.*

*What is it?*

*To me it is someone handing me a form  
and saying, "Fill this in".*

*It's hard to put into words just what happens to me.*

*Every part of my body stiffens. I go hot all over.*

*I feel like I am going to pass out. I can't move.*

*I can't speak and there is a little man in my head bashing  
my brains with a hammer.*

These opening lines from a poem, *Fear is*, express the feelings of many people. Yet forms are the principal means for businesses, government departments and public utilities to talk to their customers. Sadly, for many people, the conversation seems to be in a foreign language, with far too many forms still virtually incomprehensible to ordinary folk.

The UK's Inland Revenue won its first award from the Plain English Campaign in 1984 and it has been a regular winner since. But only the first award was a form — a simplified tax return. The person responsible for the design was Mike Foers, who was then the inspector in charge of the department's forms design unit. And he has been campaigning for simpler forms ever since.

In 1985 he was awarded a Civil Service Fellowship to look at what other countries were doing to simplify administrative forms and how they were tackling the problems of communicating

with the public. After completing his study, Mike returned to the Revenue to work in internal communications — but he has never lost his passion for forms.

### Communicating by Design

Mike's philosophy for forms is based on two precepts: user-friendly design and clear, simple language. "All too often," he says, "forms are designed to meet the needs of the organisation without any thought being given to the problems this causes the recipient. And forms are never given the priority they need at the design stage; it's usually a last-minute job."

Problems can arise from a long or unfamiliar word; a long or complex sentence; a long line of type; a string of words in capital letters; or text in a small typesize. If such problems waste just five minutes' time for each user in an organisation which uses 200,000 forms, the burden imposed on the public is equivalent to two years' wasted time — or, in cash, upwards of £50,000.

In some situations the consequences can be more serious. People who need to claim benefits but who cannot understand the forms they must complete, are denied their rights or suffer delay in payment.

There is also the additional burden on the organisation, the staff time, and the extra postage of putting right the errors in incorrectly completed forms. In Sweden, applications for housing allowance were taking far too long to process because of errors in completion. This was not only costing the department money, but also delaying the payment of benefits. The Ministry devised, with the help of consultants, a form that has little cartoon illustrations to help people complete it. The result was a dramatic reduction in errors and a better customer service.



The costs of completing and processing a form are estimated to be 20 times the costs of producing it. So a little extra money spent at the design stage can be very cost-effective.

But sometimes designers become too involved with design and lose sight of communication. Mike believes his skills come from working in a big organisation with many forms, from an involvement with plain English, and from an enthusiasm which outweighs his lack of formal design training.

### **Have Form, Will Travel**

At the end of his fellowship year and following the publication of his report — "A Comparative Study of Administrative Forms" — Mike was invited to give a workshop in Paris to OECD representatives. He also visited Ankara and Istanbul, the Escola d'Administracio Publica in Barcelona, and an international UNESCO/ICOGRADA conference in Nairobi.

His first design assignment came with an invitation from the International Monetary Fund. The assignment, in October 1988, was for two weeks in Budapest. Hungary had a personal income tax system — the first in more than 40 years — and needed a tax return ready to issue in January 1989. The department's draft form was 11 pages long with more than 70 pages of typescript notes! Two weeks later they had a four-page return, and the notes were contained in a 16-page booklet incorporating a ready reckoner, to help people in the new self-assessment system.

The next overseas assignment was another IMF mission in 1992 in Sri Lanka, where tax collection was being computerised and new stationery was needed. Sri Lanka has two official languages — Sinhalese and Tamil — and uses English as a link language. All Government forms must be in the three languages, so space was at a premium and instructions had to be simple and clear.

If designing the forms was one challenge, getting them printed was another. Producing continuous stationery in Europe may be an everyday occurrence; in a developing country it is entirely different. But after two months, the tax department had a series of new forms.

Currently, Mike is working on a project with the tax department of the Government of Lesotho in southern Africa. He is redesigning existing forms to make them easier to complete and process; designing new forms, as the tax system is overhauled; and introducing a corporate style for stationery. Many of the forms are bilingual — Sesotho and English — but after coping with three languages in Sri Lanka, two languages are relatively easy.

**Danka Introduces a Short-Term Lease in Plain Language**

The following appears in the advertising brochure for Danka's new short-term copier lease.

With other photocopier distributors you could spend a fortune on legal fees, sorting out the contract you thought you signed from the contract you actually did sign. Sir Bryan Carsberg, the

Director General of Fair Trading in the OFT's report "Photocopier Selling Practices", March 1994, writes: "Misrepresentation, obfuscation and deceit are the things that are objectionable."

Danka agree

So we have introduced a simple 5-point agreement which can be cancelled, at any time, with just 90 days written notice. Nothing more to pay. No penalties. No upgrades. No small print. And it doesn't matter if you're a well established company or if you are just starting up: it is exactly the same contract.

**Short term Lease**

Customer No:

Agreement No:

**Customer**

Full Name .....  
 Address .....  
 .....  
 Post Code .....  
 Name of Bank .....  
 Address .....

Type of Business .....  
 Years in Business .....  
 Tel No .....  
 Fax No .....  
 Company Registration No .....  
 Sort Code   -   -

Note: This document is not to be used for agreements regulated by the consumer credit act, 1974

**Supplier: Danka**

Branch: ..... Sales Person .....  
 Address: ..... Tel No .....  
 Payment Terms Rentals of £  + VAT payable quarterly in advance  
 Cost per Copy  pence + VAT payable monthly in arrears.

**Equipment**

Quantity	Manufacturer	Model No	Description
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

**Terms and Conditions**

1. This agreement may be cancelled by either party at any time by giving 90 days' notice to the other by recorded delivery letter. Upon cancellation the Customer will make the Equipment available for collection by Danka.
  2. Rental payments are fixed but the Cost per Copy may be increased annually in line with the R.P.I.
  3. The Cost Per Copy includes all replacement parts, labour, black toner, consumables, and call outs. It does not include charges due to misuse of the Equipment. Paper and any coloured toner will be charged separately. Danka will not be liable to the Customer for failure to provide services due to causes beyond its control.
  4. The Customer will fully insure and take proper care of the Equipment and will immediately advise Danka if the Equipment is lost or damaged.
  5. Danka excludes all express or implied warranties in respect of the Equipment. In no event will Danka be liable to the Customer for any consequential loss (including any loss of revenue or business) arising from the use of the Equipment. The Customer indemnifies Danka against any loss, damage or injury caused by the Equipment or its use, except for death or injury caused by the negligence of Danka.
- This does not affect your statutory rights.**

**Signatures**

Signature(s) of Customer(s)	Name	Position	Acceptance for and on behalf of Danka
Duly authorised			Date:

**Owner**

Danka UK plc, Maidenhead House, 112 Bartholomew Street, Newbury, Berkshire RG14 5DT Tel: 01635 31103 Fax: 01635 31101

## New Police Caution Is a Loser

Reprinted from the *Law Society Gazette*.

"You do not have to say anything. But if you do not mention now something which you later use in your defence, the Court may decide that your failure to mention it now strengthens the case against you. A record will be made of anything you say and it may be given in evidence if you are brought to trial." From the Home Office guidelines

### Caution baffles A-level students

Home Secretary Michael Howard has been told that not even A-level students are able to understand completely the new 60-word police caution to be given to arrested suspects.

The warning comes in a response to a Home Office consultation paper by the law reform group Justice.

In a letter to Mr. Howard, Dr. Gisli Gudjonsson, a London University forensic psychologist and former Icelandic police detective, writes: "Unless the proposed caution is markedly simplified it is likely to result in cases of miscarriage of justice because some vulnerable suspects may erroneously incriminate themselves."

And Dr. Gudjonsson points out that the new caution might backfire on the home secretary in other, more ironic, ways. "Some guilty persons may be acquitted on legal technicalities after it can be shown that they did not understand the police caution," he maintains.

The Justice response and Dr. Gudjonsson's verdict will provide further ammunition for defence lawyers. Experienced duty solicitors and other police station advisers have long maintained that the caution — which attempts to explain the new restrictions on the right to silence — is too complex.

According to the research done for Justice by Dr. Gudjonsson, only 15% of a group with learning disabilities and 21% of those detained under the Mental Health Act understood all three

sentences of the new caution. But perhaps the most damning statistic is that as many as 42% of the A-level students said they did not understand the full caution.

In his letter, Dr. Gudjonsson says: "Many people will not understand this caution, particularly since the majority of detained suspects at police stations are below average intelligence."

The caution is set to come into force in the spring of next year. And those who have been liaising with the government over implementation say ministers are determined to go ahead with the caution as it stands — despite it being, as one criminal law specialist said last week, "a complete dog's dinner."

**Late-Breaking News** — Apparently there is a new version of the police caution:

You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence

Any better? Ed.

## A Win for the Outgoing Chairman

Mark Adler reports that the solicitor for Surrey County Council has changed its road-diversion notices. The new notices adopt most of the suggestions that Mark set out in *Clarity* 31, page 25.

## A Breakthrough in Formbooks?

In the advertisement for *West's Legal Forms*, 2d, the publisher proclaims that they are "Written in Plain Language." According to the advertisement: "Forms were once written in an archaic language difficult for anyone but experienced lawyers to understand. West's forms are written in modern, easy-to-understand language wherever possible."





## Book Reviews

### A Practical Guide to Usability Testing

**Joseph S. Dumas and Janice Redish**  
Ablex Publishing, Norwood, New Jersey

"Watching users is both inspiring and humbling. Even after watching hundreds of people participate in usability tests, we are still amazed at the insights they give us about the assumptions we make. . . .

Watching just a few people struggle with a product has a much greater impact on [designers' and managers' attitudes] than many hours of discussion about the importance of usability or of understanding users." *A Practical Guide to Usability Testing*, page 32.

Sometimes it isn't practicable and clients' budgets don't allow it, but there's been a myth around that user-testing is rarely done by plain English exponents. In this book, Dumas and Redish finally lay the myth to rest. Both have wide experience in creating plain English documents and setting up testing procedures, and it shows.

The book argues for usability engineering, meaning the harnessing of users' responses and views to inform the development of software and machines. Dumas and Redish explain why this is necessary (it's costly and inefficient not to), what effect it has on writers and product designers (stunning and salutary), and how it can be done (no need for enormous expense or extreme scientific rigour). The how-to sections are remarkably detailed, down to explaining the convening and running of successful focus group discussions, ways of avoiding the introduction of bias into participants' responses, and the optimum arrangement of furniture in usability laboratories.

There is a particularly helpful section on setting usability goals during — not after — product development. An example of such a goal would be: "A totally naive user will be able to take this computer out of the box and have it all connected and configured in less than half an hour without calling for support." The goal then acts as a spur to product designers and instruction writers, and the success of a testing programme can be measured against it.

Most *Clarity* readers do not make software programs or machines, and there is little in the book that directly relates to testing documents, legal or otherwise. But with a bit of ingenuity, much of the information can be adapted for this purpose.

**Martin Cutts**

### Drafting and Negotiating Commercial Leases (4th edition)

**Murray Ross**  
Butterworths

When I reviewed the third edition of this work, I said how impressed I was with the text, which was detailed, well-researched, and practical in its outlook. The text in the fourth edition deserves all those comments, and is of course up to date (the law is stated as at 1 March 1994). Each clause of a commercial lease is analysed, explained, and put in context, with chapters also on underleases, renewals, and completion and post-completion practicalities.

As a textbook for a practitioner, it is excellent.

The main difference between the third and fourth editions is that the third included the Rosscastle Letting Conditions, while the fourth does not. The Conditions were a brave attempt to introduce standard commercial letting conditions that could be incorporated in leases by reference (in the same way that the Standard Conditions of Sale are incorporated into contracts for the sale of land). Unfortunately, the Conditions were not taken up generally, and Murray Ross has admitted defeat (for the time being, at least). Instead of persevering with the

Conditions, the fourth edition of his book includes a selection of precedents of complete leases and of individual clauses.

The complete lease precedents are —

- leases of whole buildings (long and short forms)
- leases of parts of buildings (shops and offices)
- a lease of an industrial unit on an estate

The individual clauses cover alternative versions of service charges and insurance covenants, and include clauses for rent review, underleases, and contaminated land, and an alternative clause qualifying the landlord's right of access.

All the precedents are clearly written, and should appeal to all but the most radical of CLARITY members. They are also supplied on a 3 1/2" computer disk, which is included in the cover price. Apparently, they can be retrieved in WordPerfect (for DOS or Windows), Wordstar, RTF or ASCII format, but so far I have been unable to get into the disk to extract them.

As in the third edition, the book also includes a useful checklist for the tenant's solicitor and sets out the text of Part II of the Landlord and Tenant Act 1954.

The book is well worth its cover price to anyone who deals with commercial leases, however frequently or infrequently. Although I personally am disappointed that the experiment of the Rosscastle Letting Conditions did not get off the ground, after five years a new edition of Ross's book was needed, and this edition can be highly recommended.

**Justin Nelson**

## Drafting Settlements of Disputes

**Michael Arnheim  
Tolley Publishing Co Ltd**

All too often, settlement agreements, consent orders, and similar are drawn up in a rush — and show it. This book first demonstrates how easy it is to make serious mistakes in writing letters in negotiation, in agreeing on settlement terms, and in drawing up consent orders, then shows how to avoid those mistakes

It covers a wide range, from negotiating the terms of a settlement (including a discussion of the lawyer's role and "21 golden rules of negotiating") to recording agreed terms in a memorandum or incorporating them in an appropriate order (or both, as the author recommends).

I found the analysis of the relevant law excellent: it explains the legal background to various aspects, identifies critical factors to bear in mind, and shows how to avoid fundamental errors. It enables the reader to understand the points that should be covered in letters, agreements, and orders, and to appreciate how they are best covered.

Where the work disappoints is in the drafting advice and the specimen documents. I may be over-critical, as the author is a member of CLARITY, and I expected better of him. I was disappointed in the sparse drafting tips (avoid "legalese"; use — but do not rely on — punctuation), and in the precedents: the precedent agreement on page 65 contained irritating details (using *hereby* and *shall*, for instance) and was defective (providing for only two out of ten installments of the settlement sum to be paid).

That said, any lawyer (certainly, any CLARITY member) worth his salt will recognise and compensate for the drafting shortcomings. The real value of the book is in its text, which is a handy but detailed account of the relevant law.

**Justin Nelson**

## Mellinkoff's Dictionary of American Legal Usage

**David Mellinkoff**  
**West Publishing, St. Paul, Minnesota**

In 1963 David Mellinkoff published *The Language of the Law*. Mellinkoff wrote in its introduction that his book was "a beginning. The goal is nothing more modest than the rationalization of the language of the law". He followed that book with *Legal Writing: Sense & Nonsense* in 1982. Both these books set out how the language of the law developed and why lawyers use certain words and phrases. They were written to explode the "myth of precision" and to show lawyers that they were fooling themselves if they thought the traditional way of writing had some special magic. They are also practical books, both with a detailed word and phrase index. So it was a logical step for Mellinkoff to produce a dictionary of the words and phrases themselves.

Mellinkoff floated the idea for his dictionary in 1983 in a lecture given to the Los Angeles division of the University of California Academic Senate. This lecture was "The Myth of Precision and the Law Dictionary", 31 *UCLA Law Review* 483 (1983). In it he stated that "I think that the complete law dictionary on historical principles, the path of the OED, will remain a scholar's dream". He thought that the path shown by Fowler's *Dictionary of Modern English Usage* would be a more useful one to follow. Mellinkoff proposed that *A Dictionary of American Legal Usage* would

help to resolve the identity crisis of the law dictionary. The new dictionary would not be an old curiosity shop, nor a sort of legal encyclopedia. It would not be a dictionary of law, but a dictionary of the language of the law as used in America today.

Of course, before Mellinkoff published his *Dictionary*, another was published. Bryan Garner produced his *Dictionary of Modern Legal Usage* in 1987. This also has Fowler as its inspiration. But Garner's is a very different book, and I will explore some of the differences later. However, all three have one thing in common: the personality of the author appears in many entries. This makes Fowler, Garner, and Mellinkoff much more fun to read than an impersonal grammar book or dictionary.

*Mellinkoff's Dictionary* has a number of features that make it easy to use. At the front there is a complete index of entries. The print is clear and the pages well set out. The organising principle for *Mellinkoff's Dictionary* is based on the themes underlying his earlier works. Words have a place in the dictionary, he explains in the Preface, "when the law gives them a specialized sense; or to emphasise that there is none".

This approach means that there are two main styles of entry: those which simply explain a legal word or phrase and those that show why a certain term should not be used.

Some entries simply explain the special meaning of a word in common use. For example, "**novelty**: a requirement of patentability . . . not a requirement of copyright".

With a legal term such as *joint and several liability* Mellinkoff explains what it means, then includes an example that uses the term in context. This is a very useful part of the *Dictionary*. The examples are made distinctive by a mark in the text and a different typeface, so it is easy to tell them from the explanations.

Mellinkoff does not attempt to find a plain language alternative for every traditional phrase. Some words and phrases have technical meanings and have to be used.

But turn to a phrase like *null and void*. As well as explaining what it means ("void and void, which is to say *void*"), Mellinkoff criticises its use in the colourful language characteristic of his other work. He writes that *null and void* is

one of those once fashionable coupled synonyms that refuses to admit it is dead. It has developed a flair for redundancy. Writers shower the corpse with flowers . . .

He then gives his advice on usage: "Null and void is best abandoned".

As well as treating legal words and phrases, he has some general entries, such as those on "coupled synonyms" or on "formalisms". In the latter he lists many oral and written formalisms and says that

**Written formalisms** are flourishes of a style long dead, an encumbrance; those listed here should be liquidated — not replaced, liquidated.

Where old Latin or French phrases still have a use, he does not condemn them, but sets out their proper spelling, pronunciation, and use: for instance, the entry on *cy près*. But when the term no longer has a use, he says so: "caveat emptor . . . an old and worthless maxim . . ."; "arguendo . . . the equivalent of ordinary English for the sake of argument . . . Prefer the English".

Since Mellinkoff has set out to cover the language of the law as used today, he includes a number of more modern terms such as *forum shopping*, *scab*, and *poison pill*.

Does Mellinkoff achieve his aims? To a large extent the answer is yes. The *Dictionary* is easy to use, well set out, and well written. His explanations of legal terms are clear and succinct, and the examples are helpful. His *Dictionary* is designed to inform and help change lawyers' habits by showing them a path away from the traditional style.

However, the *Dictionary* must be compared with Garner's work. Garner covers a much wider range of matters. It is a much better reference tool, since Garner gives attributed quotes for many of his examples, as well as more cases. While both are primarily for a US audience, Garner's *Dictionary* covers words and usage that readers in England or Australia will find more useful.

Mellinkoff does not deal with many grammatical or syntactical matters. For example, Garner has a long entry on "punctuation" and discusses "problems with adverbs" and "back-formations". Mellinkoff does not deal with any of these. Garner has produced a legal Fowler and a dictionary of legal words and phrases. Mellinkoff has produced only a dictionary, which is what he set out to do. If I were asked to choose between Garner's and Mellinkoff's dictionaries, I would say buy both if you can. This is because the ground they cover is different although overlapping. But if you must restrict yourself to one, choose Garner's.

Mellinkoff has produced his *Dictionary* at the end of his career. It is not his most important work — *The Language of the Law* still remains that. *Mellinkoff's Dictionary* is still a very fine work and far in advance of most other legal dictionaries in both content and design. Mellinkoff also gives one of the best answers to a most difficult question: "what is plain language?" His entry states: "plain language: an imprecise expression of hope for improvement in the language of the law". It is that hope that keeps us all going.

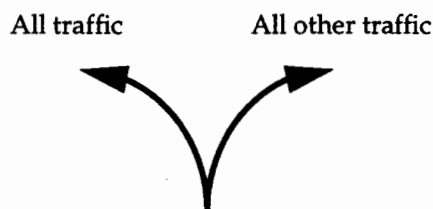
Mark Duckworth

## Letters

### Compliments on *Clarity* and News About the Next Issue

Dear Mark,

1. First of all, congratulations on yet another excellent issue of *Clarity*. It simply gets better all the time.
2. I trust the Annual Supper was a success, and that despite your retirement as chairman it will not be your Last. I also trust that you received appropriate bouquets for your excellent work as chairman.
3. Your contextually confusing Diverted Traffic experience (*Clarity* 31, page 32) reminded me of a road sign I saw recently in Sydney, at an intersection where major roadworks were in progress:



4. As to the "Sydney" issue of *Clarity*, I would propose co-ordinating contributions (of a page or two each) from a number of Australians working in plain language. I will try to extract about 10 articles — some authors will be CLARITY members, some will not.

**Peter Butt**  
The University of Sydney  
Faculty of Law

### Comments on CLARITY's Proposed Interpretation Clauses, in *Clarity* 31, pages 12-14

Dear Mark,

Many many thanks for all your good work as chairman of CLARITY. Long may it continue as editor.

I thought the October issue of *Clarity* was excellent. I particularly liked your piece "The folly of euphemism".

On the draft interpretation clauses, you asked for comments. What a good idea. To be really useful, though, they need to be thoroughly non-controversial. Otherwise I think people will not use them.

As to this:

15.1 (d) and (e) — Although many leases provide that service at the property is good service on the tenant, it will be a rare case when a solicitor acting for a tenant advises acceptance. The tenant may underlet the property, or it may be empty. Similar considerations apply to mortgages. So let's drop those two from any standard interpretation clauses.

16.4 — This is an excellent example of a clause defining what is included in the demise, but it will not apply, for example, to a demise of a whole building. Perhaps the intention is that the lease drafter will incorporate selectively — but perhaps that defeats the object.

As Alison Plouviez says, "The more you think about it, the more difficult it gets". But congratulations to Richard Castle and Justin Nelson for making a start

**N.C. Lear**  
Debenham & Co  
Solicitors

Dear Mark,

As always, I read the most recent *Clarity* with interest. I have some comments on the Interpretation Clauses on pages 12-14. They come from a non-lawyer's point of view, which may give them an interesting slant for many of your members.

My comments relate to those clauses which have a property bias, since I do not feel competent to comment on other matters.

General —

All lawyers should be assured that I, and I suspect many of my Chartered Surveying colleagues, welcome any move which is likely to get property-oriented legal documents, in particular leases, expressed in clearer, simpler language.

However, the preparation of complex documents, tailor-made for a particular situation, using standard clauses is fraught with problems. Some of my colleagues have prepared what are colloquially known as "structural surveys" using standard word-processing paragraphs. It may be cost-effective for the surveyor but cheats on the client, who used to be the person who mattered in professional circles. Sadly, in my profession, this is not now so much the case.

However, the worst aspect of preparing documentation in this way is the complacency it induces in the professional. There is a very natural human tendency to omit rigour from drafting in such circumstances.

16 Leases —

16.4 Elements for inclusion in "the demised property".

In my experience, many lawyers are guilty of inept drafting of leases, particularly in residential circumstances. Few have any conception of how the simple but somewhat important matters of maintenance are undertaken during the term of a lease by parties such as managing agents, who have relatively little, if any, chance of input into the initial definition of the repairing obligations.

For instance, I have advised one party to a lease on the practicalities of repairing structural floor timbers, known in the trade as "joists", where the division between two flats, one above the other, is defined as being through the middle of the depth of such joists. Anybody with an ounce of practical sense would realise that it is virtually impossible to repair rotted timbers without replacing the whole member. What happens if one or either tenant refuses to join in the remedial work?

Lawyers should remember that leases are generally only referred to either when there is an impending dispute or when the two parties to the document are involved in a matter which affects them both. Otherwise, the document merely sits in a deed box. In other words, when the parties require clarity, if it is ill-drafted, they are badly served.

I applaud the intention to define those elements of the property which are included within the demise. However, why are window sills excluded from "windows, window frames and window glass"? In building parlance, the sill is that part of the window frame which projects beyond the external face of the property so as to shed water clear of the fabric beneath. It is illogical to exclude this from the definition of windows and their frames, since it is invariably attached in a solid manner.

It frequently happens that windows and their frames are included within the tenant's demise, but the external decoration is the responsibility of the landlord. Unless there is a mechanism whereby the landlord can override this liability and repair the tenant's windows, the landlord is faced with the possibility that, each time the property is decorated externally, he may be faced with painting over rotten timberwork. Without specific provision, his only mechanism is to try and persuade the tenant to repair the defective member. If the tenant refuses, the mechanism of a dilapidations claim is his only recourse. It is a very practical problem. I know — I have had to deal with such a situation involving 48 Flats!

## 16.6 Obligation to maintain property

This clause appears to be fraught with controversy, albeit from the best of motives. If, as the drafters intend, it is to be interpreted simply, the lack of the word "repair" places an obligation on the party with responsibility for this clause to do little more than clean it, arrange the furniture, and decorate it regularly. There is no sense in which the somewhat necessary regular repair of a building is required.

Furthermore, defining the standard of maintenance in relation to that which existed at the date of the lease flies in the face of the mass of case law surrounding the area of dilapidations. At present, the only way in which the standard of repair is related to the commencement of the lease is for each party to agree to a record of the condition of the building at the beginning. Certainly this clause would simplify matters in such circumstances.

What would happen if, as is frequently the case in old commercial properties, the tenant were to improve, extend, and alter the property out of all recognition. Clearly he would satisfy this clause, but would there be a corresponding obligation on the landlord to financially recognise the improvement in the investment value of his property as a result of the tenant's exceeding the terms of this clause?

It is not that I object to this clause; far from it — if properly drafted, it could introduce greater fairness into an area of the lease which is open to a lot of abuse, particularly by landlords. However, I would be concerned at setting the standard at the date of the lease rather than at the commencement of the term. As we all know, leases are frequently dated many weeks, months, and even years after the commencement of the term.

I hope these comments are of some interest. They are not intended to be negative criticisms. I find many of the ideas expressed in this article refreshing. I trust Messrs. Castle & Nelson will continue with their good work.

**Richard Allen**

Richard Allen & Associates  
Chartered Building Surveyors

---

### Comments on the Criticism of Special Conditions of Sale in *Clarity 31*, page 23

Dear Mark,

I must get this comment in before Richard Castle does!

Under the title "Customising the standard conditions of sale", you criticise the common special condition for reduced deposits for its poor drafting.

There is a more fundamental comment: the special condition is completely redundant, as standard condition 6.8.4 covers the point very well.

Other commonly used redundant special conditions are:

- "The provisions of this Agreement shall remain in full force and effect notwithstanding that completion has taken place" — see standard condition 7.4.
- "If the expression 'the Seller' refers to two or more people their obligations are joint and several" (and the same for 'the Buyer') — see standard condition 1.2.
- "The parties hereby authorise their respective solicitors to effect exchange of contracts by hand, post, fax, telephone or such other method as they may decide . . ." — see standard condition 2.1.
- "The deposit payable hereunder shall be paid by banker's draft or Solicitors' Client Account Cheque" — see standard condition 2.2.1.
- "Any interest earned on the deposit money shall belong to and be paid to the Seller" — see standard condition 2.2.3.
- "The Property is sold in its present actual state and condition and the Seller gives no warranty . . . (etc)" — see standard condition 3.1.3.
- "The Seller warrants that any chattels hereby agreed to be sold are his own absolute unincumbered property" (usually inserted by buyers' solicitors) — see special condition 9.2, bearing in mind the warranty as to title implied by the Sale of Goods Act.

I find it worrying that solicitors are amending the standard conditions without actually knowing what they already say.

On a related topic, I find that solicitors do not know what the Law Society's Code for Completion by Post says. Often, in response to the question "Will you use the Law Society's Code for Completion by Post (1984 Edition)?" I get the reply "Yes, at the Buyer's risk". I think this is meaningless. On asking for an explanation, I am usually told that any documents sent to me will be at the Buyer's risk — paragraph 7 of the Code already says so.

Recently, the "explanation" I received said—

We are anxious to avoid the situation where in the event of a second charge being disclosed by your Land Registry search, having regard to the decision in *Edward Wong Finance Company Ltd -v- Johnson Stokes & Master*.

This worried me — did the *Edward Wong* case highlight a defect in the Code? I looked up the case, then realised it was the case that had prompted the Law Society to issue the Code in the first place; it could not be criticising the Code, as the Code did not exist when the case was decided.

It turns out that the seller's solicitors simply did not want to give the blanket undertaking implied by adopting 3(2) of the Code. Their original reply should therefore have been "Yes, except paragraph 3(2)", leaving me to obtain an explicit undertaking for specific charges.

In another case, the seller's solicitors have refused to adopt the Code; they are willing to complete by post, but "at the Buyer's risk". In this instance, they mean just that: it is for the Buyer to risk the loss or misappropriation of the money, the seller's solicitors' failure to send the deeds, etc. As the seller's solicitors are a large London firm, whose honesty cannot be questioned (even if their reasonableness can), my clients have decided to take the risk, rather than pay me extra to complete in person.

**Justin Nelson**  
Solicitor

---

To the Editor,

The note as to the obscurity of the common additional condition of sale (requiring any conveying deposit of less than 10% to be made up to 10% if the contract goes off other than through the fault of the seller) is noteworthy for its pointlessness in any event.

There are two circumstances in which this condition might apply:

- a. Where the contract is frustrated through the fault of neither party, e.g. compulsory purchase between exchange and completion. Under the terms of Section 1 Law Reform (Frustrated Contracts) Act 1943, the deposit paid is returnable and the balance stated in this clause to be owed shall no longer be payable — the clause might therefore never have been inserted.
- b. Where completion does not take place owing to the buyer's fault when the seller is able and willing to complete. The seller can then give a completion notice, and under standard clause 6.8.4(b) the buyer "is forthwith to pay a further deposit equal to the balance of that 10 percent".

Not only therefore is all this verbiage obscure, but it is totally unnecessary.

**David R. Pedley**  
Turner Lynam  
Solicitors

---



## Poor Drafting and Unfair Conditions

To the Editor,

The following comment by Staughton J. is from *Stay Line Ltd. v. Tyne Ship Repair Group Ltd. (The Zinnia)*, [1984] 2 LL. L.R. 211. The case involved a ship-repairing contract between two commercial firms (i.e., not a consumer).

I would have been tempted to hold that all the conditions are unfair and unreasonable for two reasons: first they are in such small print that one can barely read them; secondly, the draftsmanship is so convoluted and prolix that one almost needs an LLB to understand them. However, neither of these arguments was advanced before me so I say no more about them.

**Robert Lowe**  
Lowe & Gordon Seminars

## Forms the Foers Way

Dear Mark,

Thank you for the copy of the latest edition of *Clarity*; it is a good read.

I had been meaning to write to you for some time now and never got around to it, but the arrival of the magazine reminded me of my omission. I have now taken early retirement from the Revenue, but I am continuing with my forms design and plain language interests. I have an on-going assignment with the Government of Lesotho designing forms for the income tax department; and I'm hoping that this will be extended soon into customs duties and sales tax.

I was out in Ghana last month giving some assistance to the civil service department. This involved designing some forms and giving some training.

On a personal note, I went along recently to a solicitor in St. Albans to make a new will. I asked whether he had heard of CLARITY; 'yes' was his reply, but he went on to be quite dismissive about the role of plain English in the law. His fear seemed to stem from a reluctance to draft a will which might fail to achieve its desired intention. Has any work been done to test a plain-English will? Are there any guidelines? I know that the wording of a will is supposed to reflect the wishes of the individual concerned, but when affairs become a little more complicated it seems the lawyers fall back on the tried and tested formulas. The absence of punctuation only adds to the confusion and the mystique. It's one thing for the solicitor to be able to understand it, but the testator ought also to be able to understand and not have to rely on the solicitor's assurances that it is in order.

**Mike Foers**  
19 Lancaster Road  
St. Albans  
Herts ALI 4EP

Dear Joe,

Mark Adler suggested that I write to you about my current work, presumably in case you think it worthy of a mention in *Clarity*. I am enclosing a copy of an article that appears in the latest edition of *Communication Europe*. [It's reprinted in this issue.]

Since the article was written, I have been on another assignment to Africa. This was for the Overseas Records Management Trust — a part of the Institute of Commonwealth Studies at the University of London — and involved a two-week visit to Accra, in Ghana, to give advice and training on forms design, and to design some forms needed in connection with a new Civil Service computerisation project.

**Mike Foers**

**CLARITY Handout Used at  
Credit-Industry Conference**

Dear Mr. Adler,

Many thanks for sending me the outstanding copies of the *Clarity* journal for my collection, together with the tie.

I enclose a copy of the CLARITY handout I used to introduce the Plain English Workshop at the 1994 Annual Conference of the Money Advice Liaison Group. The document was appreciated by the 20 delegates who attended the workshop. The delegates were drawn from both sides of the credit industry. As matters turned out, I was really an "introducer" rather than leader of the workshop.

David Bray gave a talk for about an hour illustrated with many references to howlers (e.g. the NHS definition of a bed and a Trade Union job specification). He is an affable individual (a methodist lay-preacher in his spare time and a former Mechanical Engineer). He presented an interesting talk. He is obviously kept very busy travelling up and down the country.

He said that the Plain English Campaign worked with lawyers. Why didn't lawyers use punctuation in their document? He urged that consumers should challenge companies who used incomprehensible forms. He mentioned an example of an insurance company who "dry-cleaned" a policy document through the Plain English Campaign which later resulted in increased sales!

He gave a number of simple guidelines:

1. Use short sentences — 15/20 words.
2. Make it human — i.e. *I, you, we*, etc.
3. Use everyday English.
4. Use active verbs.
5. Avoid "hidden verbs" (using verbs as nouns).

He said that Plain English was good for you!

After the workshop, a senior Bank Official stated that one bank had spent over £250,000 on "dry-cleaning" their guarantee documents through the Plain English process but had taken the precaution of "copyrighting" the outcome.

**F.W. Oakes**

Solicitor & Company Secretary  
Empire Stores Group plc

**Oops!**

Dear Mr. Adler,

In reading the latest copy of *Clarity* [31], I noticed that the index on the front cover graciously grants me authorship of *How to Write Regulations and Other Legal Documents in Clear English*. While I would certainly like to take credit for this work, it was written, as the book review on page 18 shows, by Dr. Janice C. Redish.

Although as a new member I have not seen many issues of *Clarity*, I particularly enjoyed this one. It has some wonderful examples of how the use of plain language dramatically improves legal writing. Also, having recently met Mark Duckworth and Christopher Balmford during their tour of the U.S., reading about their activities was especially meaningful.

I look forward to future issues.

**Anita D. Wright**

Associate Communication Specialist  
Document Design Center  
Washington, DC

**HRH?**

To the Editor,

One cheer for Prince Charles on his endorsement of the Plain English Campaign. Why *should* we use five syllables where one would do?

He can have the other two cheers when he announces that he is to be referred to as "him" instead of "His Royal Highness".

**Mark Adler**

## News About Members

**Richard Bagley** has moved to the Consolidated Insurance Group Limited.

**Judith Bennett** is the new Precedents & Plain Language Manager at Freehill Hollingdale & Page, in Melbourne. The Precedents & Plain Language Group has its own newsletter, which recently contained the following statement from the firm's managing partner in Melbourne:

Melbourne's Board is committed to focussing on precedents as its priority for 1994. This includes being committed to plain language and design principles in precedents.

The firm is responding to the demand from business, consumers, and government that legal documents be more understandable and user-friendly. Plain language precedents mean our service to clients can be the best — as well as legally accurate, innovative, and client-oriented. Within the office, plain language precedents can assist us to manage our time and resources efficiently and profitably — as well as improving quality and productivity in legal services.

**John Blank** has moved to Finchley, where he is a partner in Blank Swerner & Grant.

**Lord Justice Hoffman** has been appointed a Lord of Appeal in Ordinary.

**Peg James** is practising as a legal writing consultant at 3695 Loraine Avenue, North Vancouver, BC (Tel. 604 983-0747; fax 2447).

**David Rickett** has left Allied Dunbar and is now back full-time in the legal profession as a probate consultant.

**Murray Ross** is now practising in Colchester.

**Andrew Sims QC** has left the Alberta Labour Relations Board and is in private practice in Edmonton, Alberta.

**Amanda Taylor** has moved back to England after service in India with the Foreign and Commonwealth Office.

Mike Foers writes: **Richard Wydick**, Professor of Law at the University of California at Davis and the author of *Plain English for Lawyers*, is in the UK on a sabbatical. His address is 3 Essex Court, 3rd Floor South, Middle Temple, London EC4. He will be there until the end of February, although he and his wife will be in the UK for some time after that date.

## 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).

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

<b>Membership in name of organisation</b>
Name of organisation
Nature of organisation
Contact

<b>All members</b>		
Address		
DX	Telephone	Fax
Specialist experience		
If you do not have a copy of <i>Clarity</i> 32, please tick here		

<b>Please send this application to</b>	
<p style="text-align: center;">(United States and Canada)</p> <p style="text-align: center;">Professor Patricia Hassett College of Law Syracuse, NY 13244, USA Tel: 315 443 2535 (Fax: 4141)</p> <p style="text-align: center;"><b>with a cheque for US \$25</b></p>	<p style="text-align: center;">(Everywhere else)</p> <p style="text-align: center;">Nick O'Brien 4 Brick Court, Temple, London EC4, England (DX 404 Chancery Lane) Tel: 071 797 7766 (Fax: 7700)</p> <p style="text-align: center;"><b>with a cheque for £15 sterling or (In Britain) a completed standing order form</b></p>

<b>Standing order (Britain only)</b>	
To: _____ Bank plc	Branch _____ Sort code ____ - ____ - ____
Branch address _____	
Account name _____	Account no _____ Date _____
Please pay to CLARITY's account 0248707 at Lloyds Bank, Cranbrook, Kent (sort code 30-92-36) quoting CLARITY's reference _____, £15 now; £15 on 1.9.96; and £15 on 1.9.97	
Signed _____	_____