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This issue

This issue—*Clarity* No 50—contains contributions from Clarity members in the US, Canada, New Zealand, England and Australia.

The major contributions are grouped into two areas: recent research into the use of plain language, and practical issues in applying plain language to legal documents.

The authors are leaders in their fields, and their articles provide valuable insights into the theory and practice of plain language.

As in most previous issues, we generally do not impose a house style on writers. We allow for variations from country to country. In particular, in this issue we have left numbers in the form authors have submitted them, rather than change them as was done in *Clarity* No 49. We want to see how the debate develops on this issue.

Dear Tony: a lesson in plain English

Ron Scheer

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Monday, May 12, 2003, was Clare Short's last day as International Development Secretary in Tony Blair's government. She sent a letter of resignation to her boss that is a model of plain English.

It doesn't beat around the bush. It sticks to simple matter-of-fact statements and uses everyday terminology to avoid ambiguity. The sentences are short and to the point.

Three of its five paragraphs are only one sentence long. Most of all, in what must have been a highly charged emotional environment, it is business-like and respectful, without losing a human touch.

It went like this:

Dear Tony,

I have decided that I must leave the government.

As you know, I thought the run-up to the conflict in Iraq was mishandled, but I agreed to stay in the government to help support the reconstruction effort for the people of Iraq.

I am afraid that the assurances you gave me about the need for a UN mandate to establish a legitimate Iraqi government have been breached. The security council resolution that you and Jack have so secretly negotiated contradicts the assurances I have given in the House of Commons and elsewhere about the legal authority of the occupying powers, and the need for a UN-led process to establish a legitimate Iraqi government. This makes my position impossible.

It has been a great honour for me to have led the establishment and development of the Department for International Development over the past six years. I am proud of what we have achieved and much else that the government has done.

I am sad and sorry that it has ended like this.

Yours,
Clare

Note how the letter is humanized and made personal by its frequent use of the words "I" and "you."

The opening and closing sentences, in positions of emphasis, are used for maximum impact. The first sentence states clearly the point of the entire letter.

The last sentence strikes a clear note of closure.

The letter mixes long, medium-length, and short sentences effectively, suggesting the rhythms of actual speech. (Only the 47-word sentence at the very middle of the letter might give some readers pause. However, braced as it is between two short clarifying sentences, it's not difficult to follow the line of thought.)

Nearly every sentence uses the active voice, so there is not the ambiguity common in public announcements about who is responsible for something that's happened.

The letter's rhetorical strategy achieves two objectives. The first is to account for her decision, ending after three sentences of explanation with the words, "This makes my position impossible." The second is to sum up six years of shared achievement and to end on a note of regret that those six years are over.

It's possible to read some anger between the lines, but the last words have the only overt ring of emotion in the letter, and they clarify how the rest of the letter is to be understood. Given the many ways to end such a letter (indicating frustration, betrayal, bitterness, or cold distancing), the eleven words Short chooses are the words of old friends who have been forced by circumstances to part ways.

Given the usual mishandling of language by public figures to explain themselves or account for their actions, Short's letter is a wonderful example of saying just what you mean.

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Is plain language appropriate for well-educated and politically important people?

Results of research with congressional correspondence

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Introduction

Many researchers have supported the premise that clear, reader-focused communication increases reader comprehension and reduces the amount of time it takes for readers to understand what they need to do as a result of reading a document.[1] As consultants, however, we often find ourselves trying to persuade organizations of the importance of writing that employs principles such as putting the message up-front, identifying distinct audiences and tasks, using headings, employing appropriate tone, and writing with the reader's needs foremost.[2] This persuasion is always a challenge—since most organizations are not swayed by the common sense argument in favor of clear communication and often not even by research that has been performed within the particular constraints of another organization. Instead, we must use evidence—drawn from **their** organization—to persuade them that using clear, reader-focused writing can save them production time as well as improve their customer service.

As a previous article discussed,[3] substantial work has been done with the Veterans Benefits Administration (VBA)[4] to rewrite the over 1,000,000 letters that are sent to U.S. veterans each year. VBA, one arm of the larger Department of Veterans Affairs (VA), distributes benefits to the nation's veterans. Within VBA, most staff members agree that rewriting these letters using Reader-Focused Writing (RFW) principles has improved communication for veterans and reduced the number of requests for clarification.[5]

Though VBA has had great success in creating clear and usable letters for **veterans**, some skeptics of reader-focused writing have argued that using RFW principles "dumbs down" a document, making it inappropriate for a well-educated and politically important audience like members of Congress and their staff members. VBA develops and directs hundreds of pieces of correspondence a year to Congress.[6] However, VBA management

and staff have been reluctant to use RFW principles in correspondence that is sent to this audience because they fear it may be too simplistic and possibly even insulting.

To further explore this issue, we worked with VBA staff to conduct a performance-based focus group session with congressional staff members who regularly handle correspondence from VA and VBA. The goal of this focus group was to develop evidence that RFW principles would work with well-educated and politically important audiences as well as with the typical VBA audience of veterans.

Methodology

We identified three basic questions for our research:

- How do congressional staff members view traditional, non-RFW correspondence they receive from VBA?
- Do participants perform better on non-RFW letters or RFW letters?
- How does a well-educated, politically important audience react to RFW letters?

To answer our research questions, we devised a performance-based focus group. A performance-based focus group varies from a standard focus group in that it incorporates a series of tasks that participants perform and the results of which can be measured, such as correct answers or length of time to complete a task.[7] These focus groups also allow for the discussion of a traditional focus group and so provide a great deal of flexibility.

We also identified specific issues that we wanted to address directly within the performance portion of the focus group. This was because staff members within VBA often resisted using certain techniques for congressional letters, feeling that the techniques were inappropriate for members of Congress. Because we had more than one research question, we linked each question to a particular approach.

Primary Research Questions	Secondary Research Questions	Methodology
1. How do congressional staff members view the current, non-RFW correspondence they receive from VBA?		Discussion
2. Do participants perform better on non-RFW letters or RFW letters?	Can participants find the task that the reader is expected to do?	Timed Task
	Do headings help participants find information more easily?	Timed Task
3. How does a highly educated audience react to RFW letters?		Discussion

First, using a pre-developed moderator's guide, we asked participants general questions about the amount of time they spend reviewing VBA letters and the types of problems they find in VBA letters. As a second step, we asked participants to perform a series of timed tasks with two versions of a letter, one written not using RFW principles and one using RFW principles. We specifically used timed tasks to collect more information about the following elements of VBA correspondence: readers' tasks, headings, and organization.

We chose letters that closely mirrored those that congressional staffers respond to every day. Modeled on real letters that we pulled from VBA files, each of our letters was approximately six pages long and included a great deal of detail. For each pair of letters, we used the same topic for our question, but asked a different question for which the answer would be in a different place within the letter. We presented the letters in the same order each time—first the non-RFW letter, then the RFW letter. Finally, we used the prepared discussion guide to debrief participants about which letters they had preferred and why.

Limits of our methodology

Our focus group was specifically designed to have a small sample size to facilitate discussion and the free exchange of ideas. The handful of participants whom we invited to attend were key members of Congressional Committees on Veterans Affairs. Each participant was an experienced staffer with extensive experience on Capitol Hill and particularly with VA and VBA correspondence.

Aside from our small sample size, we realized that our results could be skewed because of the presentation of the subject-matter in the letters we used in our testing. To create consistency, we asked participants to review

paired letters—each letter had the same content, but an alternative presentation and wording. We also handed out letters in the same order each time—giving participants the non-RFW letter first followed by the RFW letter. However, for the first letter we asked for information that was placed relatively early in the letter, and for the second paired letter, we asked for information that was located later in the letter than the information we asked about in the first letter. As a result, participants did not find the answers to the second question when looking for the answer to the first question.

Finally, our project was designed to collect qualitative data. All research has limits, but qualitative research, despite its richness, has some particular limits. Specifically, qualitative data is usually not statistically significant and cannot be generalized to populations. On the other hand, the richness of the comments can offset the limits of this research methodology and provide guidance for continued research.

Results

Research question:
How do congressional staff members view traditional, non-RFW correspondence they receive from VBA?

For the first portion of our focus group, we attempted to get context and to understand more about congressional staffers' views about traditional correspondence from VBA. All of our participants reported handling correspondence for their offices and spending from 5% to 50% of their time reading and responding to both veteran and VA correspondence, generating letters to VA and VBA, and reviewing files for oversight visits.

Participants reported a variety of problems with correspondence that they receive from VA and VBA, including:

- The failure of the correspondence to clearly answer specific questions that either congressional staff asks or veterans ask.

  "A major problem is when the Administration doesn't want to answer the questions that you're asking, and it's almost like a learned response in how to not answer questions … that's the biggest problem I'm having with official correspondence from the VA."

  "I think that it's a way that bureaucratic agencies develop to deal with not dealing with things. And so I would label it cultural rather than intentional."

- The failure to get specific dates or plans of action when they request information from VA.

  " I would say when I write letters to VA it's normally to request their position on legislation or an issue, and I need to know, even if they don't have an answer right away, I need to know when they expect to have an answer, and normally I don't get that. I get, 'We don't have information. As soon as we do have it, we'll get it to you.' That doesn't really help me … I need to have a date or a time frame to hold them accountable."

  "Information that would be helpful to me would be, 'we don't have the information now but we should expect it within the next two weeks'… so that I don't then have to, in two weeks or a month, get on the phone and have to say, you know, 'we wrote this letter to the chairman, where's the answer?'"

- The inclusion of highly generalized or stock answers when specific information is needed.

  "Giving me the history of the pension program and how you think you're meeting the congressional purpose when I've asked you what's your view on raising the amount, that's not the right answer."

  "When you are trying to get them to address a specific issue, you often get in return kind of a cut and paste, a stock, or a company-line answer—things that I could find in a budget book… But what we're trying to get is something deeper than that or trying to get more specific. I just notice that there doesn't seem to be a lot of thought, sometimes, in the responses. It's more or less: this is what we have on file, we can respond to this letter by a kind of cut-and-paste mentality."

- Presentation of the material, in particular, receiving letters that were written using "gobbledygook."

  "Legalistic language doesn't have to be bureaucratic garbage, as long as it complies with the legal requirements."

  "There's a whole bureaucratic jargon that's just not very helpful."

For our participants, the ultimate consequence of problems with VA correspondence is that it hinders them from serving veterans appropriately. Because they see themselves as liaisons between veterans and VBA, congressional staffers are focused on troubleshooting and problem-solving to get veterans' issues resolved quickly and thoroughly. Their frustration with correspondence from VBA centers primarily on not getting answers to their (and the veterans') questions in a straight-forward manner. Instead of receiving clear letters with clear answers, they get vague answers, non-answers, and legalistic gobbledygook. All of these indicate a failure on the part of VBA writers to clearly think through the message and the reader's needs—the fundamental concerns of plain language and reader-focused writing.

Research question:
Do participants perform better on non-RFW letters or RFW letters?

For the second portion of the focus group, we gave participants a series of paired letters. Each pair consisted of one letter that **did not** contain RFW elements and one letter that **did** contain RFW elements. For each letter, we asked participants to find a particular piece of information and then timed how long it took them to complete that task.

Paired letter set 1

The point of this pair of letters was to identify how long it took participants to find out what a veteran needed to do as a result of reading the letter. Using a VBA insurance letter, we asked participants, "Tell me when you know what the veteran needs to do as a result of reading the letter." Participants were given the letter and raised their hands when they found the answer to the question.

How participants performed:

	Non-RFW Letter	RFW Letter
Participants found the information within...	40 seconds	30 seconds

What participants preferred:

All participants preferred the RFW letter. Their reasons for this were:

- The letter points out the important information quickly

  "I mean first of all, they say in the first sentence what they're writing to you about."

- The letter contains useful headings

  *"I think these kind of headings, **What Do I Do Now**, **What To Do If You Find**… I mean those are just incredibly helpful."*

  *"It's [the heading] exactly what you asked us to answer, **What Does the Veteran Need to Do**."*

Paired letter set 2

The point of this pair of letters was to identify how easily participants could use letters that **did not** contain headings and letters that **did** contain headings to find specific information.

First, we handed out the complete version of a congressional letter and asked participants: "Tell me as soon as you find in the letter why VA believes that their proposed regulation follows the intent of Congress?" Participants raised their hands when they found the answer to the question.

How participants performed:

	Non-RFW Letter	RFW Letter
Participants found the information within...	1 minute, 15 seconds	15 seconds

What participants preferred:

All participants preferred the RFW letter. Their reasons for this were:

- The letter contains headings that help the reader find the information more quickly

  "If I had headings like this, I would zero in on it [the information], and that would make me go faster."

- The headings save the reader time

  "They [headings] save time from reading the whole letter."

Paired letter set 3

Next, we handed out a third congressional letter and asked participants, "Tell me when you know the amount that we are granting Ralph Veteran for his mother's last expenses." Participants raised their hands when they found the answer to the question.

How participants performed:

	Non-RFW Letter	RFW Letter
All participants found the information within...	45 seconds	10 seconds

What participants preferred:

All participants preferred the RFW letter. Their reasons for this were:

- The letter was simpler

  "You don't have those long paragraphs… it's just "You recently wrote. It's been granted. We sent [you] a check."

- The letter contained a cover letter that served as an executive summary of the details included in the enclosed fact sheet

  "Not only would we the staff find it [executive summary with fact sheet enclosed] more helpful, but the veteran [would also], if we sent this to a veteran."

On each of the tasks we used for this research question, participants both **performed better** with the RFW letter, and **preferred** the RFW letters. In particular, they responded positively to several RFW principles, including the up-front message, the higher level of structure and organization, and the use of simpler language. These principles—designed to clarify the message and enhance usability—are also ones that likely would have addressed staffers' earlier complaints about the failing of traditional VA letters.

Research Question: How does a well-educated and politically important audience react to RFW letters?

Under this general research question, we wanted to pursue one particular issue which has been debated within VBA—the use of headings. During the focus group, participants had been very clear about the advantages of headings in correspondence they received. They liked the headings and felt that they helped the reader process information in the letter more efficiently. Yet we knew from discussion within our training courses at VBA that the use of headings is controversial within the federal government because many staff members believe that using headings "dumbs down" the letter and makes it inappropriate for a well-educated audience. We wanted to hear exactly how these participants would respond.

Participants all preferred headings, and could more easily use letters with headings in the body of the letter. However, they all also shared a general feeling that headings in the body of the letter were inappropriate for members of Congress. When we probed them on this issue, participants responded that members of Congress have expectations about what professional correspondence should look like.

"If the chairman writes a letter to VA, I think he would expect something in return as a cover letter, like this, because if there was something in return to the chairman of the committee, with the big headings like this, I would take that as … unprofes-

sional. But if there was an attached fact sheet, or kind of like an issue brief, with headings, that makes it easier. I wouldn't suggest in the body of a cover letter putting big headings in an official correspondence with the chairman of a committee."

"If I'm Joe Senator, and I'm looking at that type of a letter, my initial reaction might be, 'Gosh, I'm a member of Congress writing a letter to a secretary of an agency and I get this letter back it's kind of … I don't know, it assumes that I'm not capable of finding things.' I don't know, there is that sort of message there. And it might be better, that type of heading information, might be better as an attachment."

Interestingly, when we also asked them about the ideal type of correspondence that should be sent to a member of Congress, participants made it clear that correspondence from VA and VBA is often too long, especially if it is intended to be read by a member. They suggest that VA focus on paring down the information so that the key points can be summarized. Some comments on the length of correspondence were:

"The shorter the better. I guess if I could say one thing [participant flips through the pages of the letter] … three pages! If that's the amount of information that's needed to communicate, that's fine, but one would be preferable."

"Somebody who's in a hurry, they're not going to read three pages."

"But if I were to give this to a member … all he'd read is probably the first page. I mean you would have to probably essentially summarize something like this and give it to them."

To achieve the goal of a shorter letter that is still informative to both the member of Congress and the staffer, participants all felt that the ideal construction would be a short summary cover letter with an attached fact sheet. They felt that this construction met the needs of all audiences:

- the cover letter, which serves as an executive summary, will be read and used by the member and does not need to use headings since it will be quite short;
- the fact sheet, which can employ headings, will be used by congressional staff to get to pertinent information faster and more easily; and
- both the cover letter and fact sheet will be used to more easily pass along pertinent information to the veteran.

Key findings

The key findings of our session are as follows:

- Participants report significant problems with the content and presentation of traditional, non-RFW letters sent from VA and VBA to members of Congress and congressional staff.
- Participants can find information about tasks the reader must perform as a result of getting the information faster in an RFW letter than in a non-RFW letter.
- Participants more quickly identify the main message and content of an RFW letter than a non-RFW letter.
- Participants can find discrete pieces of information faster using the headings in an RFW letter.
- Participants find the headings to be useful and non-insulting for congressional staffers.
- Participants believe that headings would be problematic—and possibly even insulting—to members of Congress.
- Participants suggest that for letters to a member of Congress, VBA should use a letter construction that contains a brief overview letter (1 page maximum) that highlights the key points with an enclosed fact sheet that includes the supporting details and uses RFW principles and headings.

Implications for further research

Our very small research project gives the lie to the concern that well-educated, politically important people will see RFW as dumbing-down. Congressional staffers consistently preferred RFW letters and performed better using them. However, they identified other important questions:

- How do our personal expectations set the mode of correspondence?
- How do our perceptions get in the way of using RFW principles?

In this instance, congressional staffers serve as gatekeepers to prevent the use of RFW principles in correspondence that goes to their bosses—despite even their own strong preference for the RFW letters. Further research should explore these questions to uncover how expectations and perceptions halt the use of plain language and good document design.

We are not clear if members of Congress actually **share** the perceptions of their staffers—or if they would prefer a simpler, more usable letter construction that is conducive to rapid recall and efficiency. Our assumption is that members of Congress would also appreciate RFW principles—including headings, up-front messages, and direct responses to questions. It is as important for future research to dispel the myths that surround people's expectations as it is to continue to document the improved speed and accuracy of comprehension that clear, RFW correspondence promotes. Perhaps our goal should be to use performance-based research to show that even important people prefer clear language.

Conclusion

Some organizations have been more successful than others in adopting clear writing as a fundamental element of their business. Often, this is because they do not have clear evidence that supports the use of reader-focused writing. Without it, they cannot see how clear writing will affect their internal operations, their customer service, or their bottom line.

Our testing focused on one government agency's attempts to better understand how its writing affects one of its key audiences—members of Congress and congressional staff. Because the service of veterans is intricately linked with the relationship between VA and Congress, it is important to make communication between the two as clear and usable as possible. Our focus group clearly showed that up until now, this has not been the case. Congressional staff were clearly disappointed with the quality of traditional correspondence that they received from VA and felt that it negatively affected their ability to serve veterans in a timely and efficient manner.

The results of our focus group show that reader-focused writing can have a positive effect on this process by reducing the time it takes congressional staff to find and understand information.

The focus group also demonstrated that reader-focused writing is clearly valued and preferred by those who must use correspondence in their daily lives. Though the results reflect only one group of people and cannot be generalized across a larger population, we believe that the results provide value on several levels. The results have strengthened VBA's commitment to using reader-focused principles in all letters—including those intended for high-level officials such as members of Congress. But we also believe that these results are useful at an even more significant level—they answer some of the critics of reader-focused writing and provide evidence for organizations who have yet to be convinced of the value of adopting reader-focused writing as part of their strategic plans and operations.

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Susan Kleimann, President of Kleimann Communication Group (KCG) and former Director of the U.S. Document Design Center, has been involved with plain language for 25 years, promoting her belief that "plain language is a civil right." Her acknowledged expertise in the fields of qualitative testing and evaluation, information design, instructional design, and organizational process analysis prompted the U.S. Senate to have her testify on the accessibility of Medicare information for seniors. She has helped design award-winning plain language initiatives for a number of government agencies. With Barbra Enlow, she wrote *Assessing Food Stamp Application Forms*, a guidebook for forms designers.

Barbra Enlow, a Partner in Kleimann Communication Group, has worked for over 10 years to help government agencies design usable information. She is an expert in the context and mechanics of information design, field testing with users, and instructional design. With Susan Kleimann, she wrote *Assessing Food Stamp Application Forms*, a guidebook for forms designers. Her work has won awards for writing and design, including the first "No Gobbledygook" award from the National Partnership for Reinventing Government, awarded for her redesign of a widely-circulated government form.

Endnotes

1. See James Suchan & Robert Colucci, *The High Cost of Bureaucratic Written Communications*, 34 Bus. Comm. 68 (1991), Reva Daniel, *Revising Letters to Veterans*, 42 Technical Comm. 69 (1995), and other sources in Joe Kimble, *Writing for Dollars, Writing to Please*, 6 Scribes Journal of Legal Writing 1 (1996-1997).
2. These principles go by many names including plain language, but, in our work with the U.S. federal government, we use the term *reader-focused writing* (RFW) to refer to this set of characteristics.
3. Susan Kleimann and Melodee Mercer, *Changing a Bureaucracy—One Paragraph at a Time*, Clarity No. 43, May 1999.
4. The Department of Veterans Affairs (VA) has overarching responsibility for attending to the needs of U.S. veterans. Within VA, the Veterans Benefits Administration (VBA) administers pension, compensation, insurance, education, and loan benefits and the Veterans Health Administration (VHA) administers health benefits.
5. *Report to the Under Secretary for Benefits, Reader-Focused Writing*, Task Force on Simplified Communications, August 29, 1995.
6. Correspondence with Congress is a routine part of the business of VBA. Some of this correspondence is policy-driven—for example, VBA responds to a Congressional inquiry about the agency's policies on a range of issues. Other correspondence is non-policy—for example, VBA responds to an inquiry from a member of Congress about one of its veteran constituents.
7. Thomas L. Greenbaum, *The Handbook of Focus Group Research*, Sage Publications, 1998.

Compliance vs Communication

Mark Hochhauser

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2003 HIPAA privacy notices

In April 2003, patients in the US began receiving Health Insurance Portability and Accountability Act (HIPAA) privacy notices from their doctors, hospitals, clinics, pharmacies, and other "covered entities" that use their personal health information. HIPAA privacy notices were designed to inform patients of their privacy rights regarding their personal health information, and what they could do to limit the "use and disclosure" of that information.

As part of the HIPAA regulatory guidelines (Section 164.52(b)—Content of Notice), privacy notices were to be written in "plain language" (Final Privacy Rule Preamble. II. Section-By-Section Description of Rule Provisions, http://www.hhs.gov/ocr/part2.html).

They are not. The regulations tell writers that "A covered entity can satisfy the plain language requirement if it makes a reasonable effort to: organize materials to serve the needs of the reader; write short sentences in the active voice, using "you" and other pronouns; use common, everyday words in sentences; and divide materials into short sections." (p. 137, Final Privacy Rule Preamble). These modest requirements proved insufficient to get HIPAA writers to use plain language. The requirements were essentially ignored.

As part of my consulting work with the US Department of Health and Human Services, I downloaded and analyzed six privacy notices and 31 online privacy notices (www.privacyrights.org/ar/HIPAA-Readability.htm). I found them to be written at an average 2nd-4th year college-reading levels. Patients will have a very hard time understanding the notices. The typical writing style used too many words per sentence, too many complicated sentences, and too many uncommon words.

While federal guidelines require HIPAA notices to be written in plain language and offer some suggested guidelines about plain-language writing strategies, there are no penalties if organizations do not write their notices in plain language. Also, the regulations did not include any examples of materials actually written in plain language.

In the aftermath of HIPAA, companies are issuing bizarre press releases, touting that they are "HIPAA compliant"—even though their notices are virtually incomprehensible to the average reader. For these companies, being compliant means that they have appropriate measures in place to protect patients' health information, not that they've written plain-language privacy notices. So they are "compliant" and "non-compliant" at the same time.

The legal need to "comply"

An employee of a state agency dealing with HIPAA emailed me: "However, the language required by the law and regulation make it near impossible to comply with regulations and make this a readable document." To that, a colleague in a federal agency dealing with HIPAA replied: "What a cop out"—seeing that argument simply as a rationale for not writing notices in plain-language.

The only language required verbatim in the notices is the all-capitalized header that must accompany all privacy notices:

> THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY.

"Comply with regulations" is the key phrase. When HIPAA rules first came out, various health associations had law firms write sample notices that the associations made available to their members. From the very beginning, notices were written to comply with federal regulations, not to communicate privacy rights to patients. Many of the notices looked or sounded alike, probably because the health-care organizations simply used (sometimes with only minor changes) the examples that their professional associations had developed.

But this was not the goal of HIPAA regulations. Each health-care organization was supposed to develop its own unique notices. That they did not is testimony to the complexity of HIPAA regulations. For example, they cover 187 single-spaced pages in the Federal Register: Standards for Privacy of Individually Identifiable Health Information; Final Rule (http://www.hhs.gov/ocr/hipaa/privruletxt.txt), and a further168 pages in the Final Privacy Rule Preamble II: Section-by-section description of rule provisions (http://www.hhs.gov/ocr/part2.html). In addition, these 355 pages were only a small part of all HIPAA regulations which were developed in the Clinton Administration and changed by the Bush Administration. Health-care organizations clearly believed that to reduce the likelihood of being noncompliant and getting into trouble with the federal government, the safest thing to do was to use the language of their health-association law firms. If law firms approved the language, then it must be all right, even if it wasn't "plain language."

Lawyers try to protect their clients from legal problems. It's not surprising, then, that the HIPAA notices, which are written with much legal input, tend to reflect legal language rather than patient language. Unfortunately, it may be almost impossible for most HIPAA privacy notice writers to communicate in language that is both legally compliant and understandable to patients. I've had several HIPAA privacy notice writers tell me that "The lawyers made us use this language." So legal input (and legal language) trumps plain language. It is interesting how much influence lawyers have over the content of materials written for consumers. Lawyers seem to be the final judge of what's acceptable or unacceptable, and no other employee in the organization seems to be able to override those judgments.

But this perspective of legal language over plain language is not unique to HIPAA. About two years ago, I also reviewed 61 Gramm-Leach-Bliley financial privacy notices that were supposed to inform consumers of their financial privacy rights. These notices were written at about a 3rd-4th year college reading level. They had too many complicated sentences and too many uncommon words (www.privacyrights.org/ar/GLB-Reading.htm). And so I was not surprised that both HIPAA notices and the financial privacy notices were unreadable, because the same emphasis of compliance over communication was at work in both settings. In fact, I do not believe that federal regulators can pass any law requiring consumer privacy notices to be written in ways that consumers can understand.

Reading vs understanding

In the spring of 2002, a US Food and Drug Administration speaker at a clinical trials conference said that the FDA was requiring clinical-trial consent forms (which may include HIPAA privacy information) to be written at a sixth-grade reading level, but was not able to offer any rationale for that requirement. Let me make some comments on that. First, I doubt that anyone in the federal bureaucracy can write a consent form at a sixth-grade reading level; anyone who recommends that kind of writing should be required to provide an example. Second, on the basis of Rudolf Flesch's Reading Ease Score, a consent form written at a sixth-grade level would have to average about 14 words per sentence and 139 syllables per 100 words. Since consent forms are a combination of both legal and medical jargon, writing to meet that criterion is virtually impossible. While some medical terms can be made simpler, they probably can't be made simple enough to reach a statistical sixth-grade reading level.

Behind such "write to the formula" recommendations is the assumption that if you write at a lower grade level more people will understand. However, this assumption has not been borne out by the research studies.[1-8] These studies assessed the impact of re-writing consent forms, patient education materials and jury instructions from higher grade levels to lower grade levels. The results are mixed. Sometimes comprehension is better, sometimes it isn't. But subjects in many of these studies tended to be college-educated, among whom the impact of plain language might be less evident.

Writing at a sixth-grade level does not mean that materials can be understood by anyone with sixth-grade education—that's a common misconception. It does not take into account changes in psychological development and how thinking skills change from concrete to abstract during adolescence. Not everyone develops into an adult with good abstract thinking skills, so readers at any age may be concrete thinkers who simply will not be able to understand abstract information in HIPAA privacy notices, financial privacy notices, informed-consent forms, patient-rights documents, etc—regardless of the grade level at which they are written. Readability and understanding are not the same.

Less information = more understanding

Readability formulas do not measure information overload. (However, I find the total number of words, sentences, and syllables / word provided by some readability software to be very helpful in estimating the amount of information readers have to process.) With changes in technology since readability formulas were developed, many writers have suggested that our technologically advanced culture can give people more information than their brains can process and understand. Different writers use different terms—"information overload" (Alvin Toffler), "information fatigue syndrome" (David Lewis), "data smog" (David Shenk), "information anxiety" (Richard Wurman). These terms try to capture what happens when readers are confronted with more information than they can easily process.

Informed-consent forms are "cognitively complex." The FDA regulates clinical trials, and requires each consent form to contain eight basic elements of informed consent (purpose, risks, benefits, etc) and six "when appropriate" elements.[9] Add to that five HIPAA elements, and recipients have to read and understand a consent form that includes 13-19 pieces of information (See Table #1 on next page).

Table #1: FDA Required Elements of Informed Consent

Eight basic elements

- A statement that the study involves research, an explanation of the research purposes and expected duration of the subject's participation, a description of procedures to be followed, and identification of experimental procedures.
- A description of any reasonably foreseeable risks or discomforts to the subject.
- A description of any benefits to the subject or to others which may reasonably be expected from the research.
- A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject.
- A statement describing the extent to which confidentiality of records identifying the subject will be maintained and noting the possibility that the FDA may inspect the records.
- For research involving more than minimal risk, an explanation as to whether any compensation and any medical treatment are available if injury occurs and, if so, what they consist of, or where further information may be obtained.
- An explanation of who to contact for answers to pertinent questions about the research and research subjects' rights, and who to contact in the event of a research-related injury to the subject.
- A statement that participation is voluntary, that refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and that the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

Six additional elements of informed consent to be used when appropriate:

- A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforseeable.
- Anticipated circumstances under which the investigator may terminate the subject's participation without the subject's consent.
- Any additional costs to the subject that may result from participation in the research.
- The consequences of a subject's decision to withdraw from the research, and procedures for orderly termination of participation by the subject.
- A statement that significant new findings developed during the course of the research which may relate to the subject's willingness to continue participation will be provided to the subject.
- The approximate number of subjects involved in the study.

HIPAA-related elements of informed consent (still evolving)

- Use and disclosure of personal health information for research.
- Use and disclosure of research information for treatment, payment, and facility administration.
- Access to information relating to your participation in the study.
- Right to decline / withdraw authorization.
- Expiration of authorization

At this point, reading-grade levels are almost irrelevant. Instead of helping people make an informed decision, too much information often leads to increased stress, confusion, impaired judgment, helplessness, and paralysis through analysis.

Informed-consent forms and HIPAA—some suggested improvements

Because medical information about human subjects in clinical trials can be shared with drug companies, federal regulatory agencies, contract research organizations, insurance companies, and the like, clinical trial consent forms will have to include a HIPAA notice as part of the informed consent process. Moreover, because consent forms suffer from the same language problems as HIPAA notices, a summary might help readers understand these incredibly complicated materials.

Table #2 is an example an informed-consent summary that could give prospective subjects an overview of a clinical trial[10]. I have been told by some in the clinical trial industry that it's too simple and doesn't include enough information. My response is that it's supposed to be simple. Would you rather have a subject read the summary or sign the consent form without reading it at all?

Too much information is an especially serious problem for older readers. President Clinton asked medical researchers to include more elderly subjects in clinical trials. But research shows some age-related declines in cognitive skills. These include short-term memory, long-term memory and reasoning—all beginning at about age 60-65. At the very time researchers are trying to recruit older subjects, those potential subjects will be starting to experience cognitive declines that may make it more difficult for them to understand the research-consent process!

And so it is with HIPAA. A large percentage of hospital patients are Medicare patients aged 65 and older. Many will be completely overwhelmed by the cognitive demands of trying to read and understand typical HIPAA privacy notices, especially those printed in tiny type.

Table #2: Informed Consent Summary

Questions	Answers
What's the purpose of this study?	This is an experiment to compare two cancer drugs for your bone cancer.
What's the procedure?	You'll get an experimental drug or standard treatment, blood tests, physical exams for 6 months.
What are the risks of being in this study?	Side effects—fever, weakness, loss of appetite. Your cancer might not get better.
What are the benefits of being in this study?	You probably won't benefit. But your involvement may help others with bone cancer.
Can I choose alternative treatments with existing cancer drugs?	Yes. You can choose standard medical treatment instead.
Is information about me kept confidential?	Yes. Your name will not appear in any publications. We may share information with government agencies.
Who should I contact if I have any questions?	Dr. Smith at 555-123-4567 or Dr. Jones at 555-987-6543 for questions about your rights as a subject.
Is my participation voluntary?	Yes. You may leave the study at any time without losing any benefits.

When HIPAA rules were being developed, an early strategy required patients to sign that they understood their HIPAA privacy rights. By the time the final rules came out, that requirement was changed to having patients sign only that they had been given their HIPAA notice—not that they understood it. Had the "sign here that you understand" requirement been kept, millions of Americans would have signed HIPAA notices that were actually incomprehensible. They had to sign; without that signature they could not be medically treated. But aside from collecting and counting signatures, and concluding that everyone understood their HIPAA rights because they said they did, what's the point of asking people to sign a document they don't understand? That would be compliance without communication.

What rights do patients have if they don't understand those rights?

This conflict of "compliance versus communication" pervades other areas of health care as well. In my home state of Minnesota, HIPAA privacy notices are given to patients along with other written materials (see my HIPAA report at privacyrights.org). For example, clinic and hospital patients receive a 10-page, 4,221 word "Minnesota Patient Bill of Rights" booklet describing patient rights under Minnesota and federal law. The Minnesota rights section is written at about fourth-year college level; the federal rights section is written at graduate-school reading level. However, when combined with HIPAA notices (which are handed out separately, because patients have to sign that they received a HIPAA notice), these three patient-rights documents total about 6,500 words (the equivalent of about 26 double-spaced pages of text)—about 30 minutes of reading time for average readers.

Re-writing such documents in plain language is almost impossible. The Minnesota Association of Patient Representatives tried to have the patient "Bill of Rights" written in plain language. Because it had to be done through the legislative process, they were told that patient representatives could give patients a more understandable document without giving them the original legislative version. But the Association could not get help to rewrite it in a way that would assure accuracy—as determined by the legislature. Even if they could, patients would have to be given both original and revised versions. If both Minnesota and federal laws were rewritten, would patients read all four documents? If HIPAA notices were rewritten, would patients read all six documents? And so in Minnesota, hospitals and clinics comply with state law by giving patients copies of their "Patient Bill of Rights"—even if patients can't understand those rights.

Typing versus document design

Although federal HIPAA regulations required plain language, they also stated: "We do not require particular formatting specifications, such as easy-to-read design features (e.g., lists, tables, graphics, contrasting colors, and white space), type face, and font size" (p 137 of the Final Privacy Rule Preamble). I was not surprised, therefore, to hear that one health-care organization shrank their HIPAA notice down to about 3 pages by simply reducing the font size! Nothing like making readers squint to read about their privacy rights.

Document-design features—such as the amount of white space in margins and between paragraphs, font size, the number of fonts, the use of illustrations, highlighted text or text in boxes, etc—can make a big difference in a document's appeal to the reader. Without any formatting specifications, most HIPAA privacy notices were simply typed, not designed.

The layered design

Federal guidelines suggested a "layered notice," as long as the key elements were included in the HIPAA notice given to patients. In this way, HIPAA requirements could be met by giving patients both a short notice that briefly summarized their rights, and a longer notice that contained all the required elements. Some support for this suggestion came from financial privacy notice research, where consumers said they didn't want to read six single-spaced detailed pages; couldn't the writers give them a shorter summary? But this recommendation was optional, not required, and I have seen only one HIPAA privacy notice (Kodak) using a layered design.

In a layered design, the first layer of the privacy notice would be something like my one-page bullet point example below (Table #3). For readers interested in more details, the next few pages would be the typical HIPAA notice (the 2nd layer). Federal regulations require that the header "THIS NOTICE DESCRIBES..." be in all-capital letters; plain-language guidelines did not apply.

It would be wonderful if HIPAA privacy notice writers could develop a one-page summary of HIPAA. But there's such an emphasis on compliance that many health care organizations simply are afraid that a one-page summary doesn't give enough information, and that they might be sued for being "non-compliant." I've been told that my one-page summary isn't feasible because it doesn't provide enough information! That's why it's a one-page summary, not a six-page single-spaced document. Others have developed one-page privacy notice summaries—they include the Atlanta Law Firm of Hunton and Williams (http://www.hunton.com/news_events/press/HIPAA_template.html) and Eastman Kodak. Has any organization been sued because their information was too easy to understand? In 2001, a federal agency employee told me—in relation to financial privacy notices—"You can't be sued for telling the truth."

The importance of consumer psychology

Is it fair to say that nobody can comply with the notice requirements and still communicate clearly? If so, is it because the ideas are too complex or there are too many pieces of information? The answers to these questions are "yes" and "no."

It's probably impossible to develop a privacy notice that can be understood by 100% of the population. Admitting that, a goal for policy makers and federal regulatory agencies is to consider what percentage of the population they'd like to be able to read and understand a privacy notice—100%? 75%? 50%? 25%? 5%?

Table #3: Summary Notice of HIPAA Privacy Practices

THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY.

Summary of your Privacy Rights

We may share your health information to:

- treat you
- get paid
- run the hospital
- tell you about other health benefits & services
- raise funds
- include you in the hospital directory
- tell family and friends about you
- do research

We may use your health information for:

- health and safety reasons
- organ and tissue donation requests
- military purposes
- worker's compensation requests
- lawsuits
- law-enforcement requests
- national-security reasons
- coroner, medical-examiner or funeral-director use

You have the right to:

- get a copy of your medical record
- change your medical record if you think it's wrong
- get a list of whom we share your health information with
- ask us to limit the information we share
- ask for a copy of our privacy notice
- complain in writing to the hospital if you believe your privacy rights have been violated

When I talked with someone at a federal regulatory agency about testing the 2001 financial privacy notices, the response was: "We never thought of that." All the effort went into developing the notices, and none into measuring the their outcome.

Policy makers are thinkers and writers, not researchers and evaluators. From a political standpoint, decisions are often made for reasons that have nothing to do with measures of success or failure.

But if you're an evaluator, an evaluation strategy is a key part of project development and implementation from the very beginning. If you're not an evaluator, you may try to figure out how well a program works after it's been in place for a while. Many times that just can't be done. I've worked with too many clients who bring me in at the end of a project and want me to help them figure out if it worked or not; usually there's no way to answer that question adequately, because the program wasn't developed with evaluation in mind.

Privacy concepts are complicated with many pieces of information. But research would show how much privacy information people actually understood. I'm not aware of any research on that topic. The federal agencies seem naively to assume that if it's written in plain language, everyone will understand it. That's nonsense. You can't write anything that everyone will understand. Intuitively, you'd think that plain language would make it more understandable; but you need evidence to support that belief. The federal agencies appear unaware of the potential problem of information-overload in privacy notices, and how the amount of information may be more important than the (plain) language in which those notices are written.

In short, federal agencies are recommending only one strategy, with no specific evidence to support it. But is plain language enough? What about document design issues? What do consumers want? No one has asked the public what kind of privacy notices they'd prefer to read, or done studies on the kind of privacy notices they really do read. Without consumer testing, plain language recommendations will not prove very effective.

Privacy-notice writers should be working with marketing experts in their organization, to conduct research into privacy notices the way they conduct market research on other corporate products and services. For example, consumer-testing could evaluate several different privacy notice formats. What do consumers understand? What don't they understand? Is there a "best" format that all financial and health-care institutions could use as a template? Without any evidence-based standard, how can companies develop privacy notices that consumers can read and understand? The only way to do that is to involve consumers as a key part of the privacy notice design and writing process.

Is it ethical to give people information they can't understand?

There are ethical implications in giving people information they cannot understand and act on, particularly when the presumed goal of that information is to enable people to make informed choices based on what they believe is best for them. On the one hand, policy makers and regulators argue that patients need more and more information so they can make better decisions. On the other hand, if information = empowerment, what are the ethical consequences of giving people incomprehensible information and then expecting them somehow to make better choices based on information they can't understand?

Unreadable information is unethical because it takes away the ability of patients to make a truly "informed" choice. At best, patients make choices that are uninformed or misinformed—not informed. How can they make informed decisions if they can't understand the information upon which those decisions are supposed to be based? Patients can't be expected to make good decisions based on bad information.

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Further Reading

1. Davis, T.C., Holcombe, R.F., et al (1998) Informed Consent for Clinical Trials: A Comparative Study of Standard versus Simplified Forms. *Journal of the National Cancer Institute*, 90(9), 668-674.

2. Cardinal, B.J. (2000) (Un)Informed Consent in Exercise and Sport Science Research? A Comparison of Forms Written for Two Reading Levels. *Research Quarterly for Exercise and Sport*, 71(3), 295-301.

3. Young, D.R., Hooker, D.T. & Freeberg, F.E. (1990) Informed Consent Documents: Increasing Comprehension by Reducing Reading Level. *IRB: A Review of Human Subjects Research*, May-June 1990, 1-5.

4. Davis, T.C., Bochini, J.A., Fredrickson, D., et al (1996) Parent comprehension of polio vaccine information pamphlets. *Pediatrics*, 97(6 Pt 1), 804-810.

5. Davis, T.C., Fredrickson, D.D., Murphy, A.C., et al (1998) A polio immunization pamphlet with increased appeal and simplified language does not improve comprehension to an acceptable level. *Patient Education & Counseling*, 33(1), 25-37.

6. Coyne, C.A., Xu, R., Raich, P., et al (2003) Randomized, Controlled Trial of an Easy-to-Read Informed Consent Statement for Clinical Trial Participation: A Study of the Eastern Cooperative Oncology Group. *Journal of Clinical Oncology*, 21(5), 836-842.

7. Masson, M.E.J. & Waldron, M.A. (1994) Comprehension of Legal Contracts by Non-Experts: Effectiveness of Plain Language Redrafting. *Applied Cognitive Psychology*, 8, 67-85.

8. Charrow, R.P & Charrow, V.R. (1979) Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions. *Columbia Law Review*, 79, 1306-1374.

9. Food and Drug Administration. *Information Sheets for Institutional Review Boards and Clinical Investigators* (FDA, Rockville, MD, 1995)

10. Hochhauser, M. (2002) The Informed Consent—How Literate Is Your Research Participant?—and "Therapeutic Misconception" *SoCRA Source*, August 2002, 34-37.

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Words at work:

A STUDY BY THE U.S. BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS

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Words at Work

In the regulation-writing world, plain language is controversial, to put it mildly. Zealots proclaim its readability; opponents declare it "dumbs down" the message. At the core of the argument, though, lies one central question: "Why use plain language in the first place?" Why, that is, in terms of its effect on core regulatory and organizational processes.

To find out, the Bureau of Alcohol, Tobacco, and Firearms conducted a study—one of many that have risen out of the plain language world in the past few years. Its fodder was 27 Code of Federal Regulations Part 7 (from the U.S. administrative code) on advertising and labeling of beer which ATF recently revised into plain language. Several points are well worth noting to begin. The rewrite:

- follows objective, quantifiable, and repeatable strategies—such as a high percentage of active voice, and line limitations in longer documents;
- does not alter the content in any way but merely restates it by, for example, positioning important points so the reader can see them; and
- is approved by ATF's body of attorneys, ensuring legal accuracy.

So, no, the revisions were not about dumbing down, simplifying, or speaking to a 6th grade level as critics contend, but of taking a standardized, familiar, and professional approach to communications. Which brings us back to the question: "Why use plain language in the first place?" The answer is this: to increase the likelihood you'll get a correct response from the reader when they act as the regulation requires. An incorrect response, by the way, could range from the reader taking a wrong action, to taking no action at all, to calling and e-mailing with questions (again and again), to contesting the regulation. The related costs—in terms of employee time, morale, and other matters—can be astronomical.

To fulfill its mission, then, the language has two primary tasks: one is to present information that the reader can comprehend and act on, and the other is to elicit the right attitude when they are doing so. For example, 27 CFR Part 7 asks:

Application for and Certification/Exemption of Label/Bottle Approval ATF Form 5100.31.

Will the readers use the right form? At the right time? Would they understand the urgency about timeliness? Would they identify why it is in their self-interest to do so?

Obviously, ATF's readers are the brewers, wholesalers, and others in the beer industry. Less obviously, they are also the ATF employees who use the regulations as a basis for related decisions and discussions. New employees, without the luxury of history or context, benefit too, since the regulations serve as a consistent, available, and legally accurate training tool. Knowing this, ATF involved three groups of subjects in their study:

Group 1: Beer industry insiders. These subjects included industry attorneys and employees including some from ATF. All were well acquainted with the regulation; in fact, most had discussed it within the last 24-hours. In addition, many felt they shouldn't be involved in the study—although they volunteered to do so. Said one participant: "I'm an ATF labeling employee, so may not be the best respondent for this purpose." Finally, this group had a long-held relationship with ATF—some were 20-year industry veterans—and would be directly affected by the revisions.

Group 2: Related industry. Primarily consisting of employees from the spirits industry, this group had some qualities in common with the first: they were intimately familiar with regulation writing (although not this particular regulation); had a predetermined relationship with ATF; and would eventually be affected by the results if ATF chose to revise more regulations in the plain language style. They differed because the content did not directly apply to them.

Group 3: Non-industry participants. This group, unlike the other two, had no industry experience except as consumers; had never read a regulation; and did not even know what regulations were. They were younger than the other participants—all but one were seniors in college. Otherwise, they were a heterogeneous group from different backgrounds with different professional interests.

The study itself consisted of five samples from the regulation, each one containing more information than the one before it. Half the participants received samples from the original regulation and the other from ATF's plain language revision. Following each sample, participants answered a set of questions: some targeting their comprehension of the information, others their feelings about it. The results, in many cases, were surprising, to say the least. Here is some of what we found:

Comprehension of the plain language version was higher for Groups 1 and 2—although they were familiar with regulation writing, ATF, and, in some cases 27 CFR Part 7. For industry insiders the scores were 19% higher and 27% higher for participants from related industry.

Throughout the study, participants were invited to provide written comments about the samples, as they saw fit. They commented 30 times on the original version. Nineteen of these comments were negative and ranged from the straight forward "Difficult to understand" to the outraged: "I have no idea what that said and it is unfair to make someone read it and pretend that it makes sense" to the sarcastic "It read like blah, blah, blah." Three additional comments mixed the good with the bad, saying, for example: "I understand this one!" but alas, not the others. Only four of the comments were out-and-out positive. Compare this to the plain language version, which received only 11 comments, five negative. And, of the five, three were about the first sample.

The scores for the plain language sample were consistently higher for all but the first sample—the one subjects complained about most. Interestingly, the longer the sample, the higher the plain language scores. The difference between the plain language and original scores in samples averaging 95 words was slight—a matter of five or six percentage points. Now jump to the sample with 265 words, and plain language scored 37% higher.

If you look at the two versions, by the way, you'll understand why. The original contained flat headers and longer paragraphs, as you can see here:

> **Misleading brand names**
>
> No label shall contain any brand name, which, standing alone, or in association with other printed or graphic matter, creates any impression or inference as to the age, origin, identity, or other characteristics of the product unless the appropriate ATF officer finds that such brand name, either when qualified by the word "brand" or when not so qualified, conveys no erroneous impressions as to the age, origin, identity, or other characteristics of the product.

In comparison, the plain language paragraphs were almost half that size, containing informative headers that immediately placed the reader in context; they also contained plenty of white space:

> **7.51. What is a misleading brand name?**
>
> A brand name is misleading if it creates any erroneous impression or inference as to the age, origin, identity or other characteristics of the malt beverage. We may find a brand name misleading by itself or in association with other printed or graphic matter. You must not use a misleading brand name.

This pattern was duplicated in another, longer sample where the plain language results were 33% better. The major difference here: the plain language version used a chart to break out a long list.

In the best of all worlds, these findings—and many others like them!—would help squelch the fiery controversy that surrounds plain language. After all, the improvements seem a no-brainer. Otherwise, the next question would most assuredly be: "Why not plain language"? The answers would be a lot harder to find.

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The elements of plain language

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I originally published these guidelines in 1992, in the *Thomas M. Cooley Law Review.*[1] Although I think they hold up pretty well after ten years, I have tinkered with them recently. So here is the 2003 edition:

A. In general

1. As the starting point and at every point, design and write the document in a way that best serves the reader. Your main goal is to convey your ideas with the greatest possible clarity.
2. Resist the urge to sound formal. Relax and be natural (but not too informal). Try for the same unaffected tone you would use if you were speaking to the reader in person.
3. Omit unnecessary detail. Boil down the information to what your reader needs to know.
4. Use examples as needed to help explain the text.
5. Whenever possible, test consumer documents on a small group of typical users—and improve the documents as need be.

B. Design

1. Make a table of contents for long documents.
2. Use at least 10- to 12-point type for text, and a readable serif typeface.
3. Try to use between 50 and 70 characters a line.
4. Use ample white space in margins, between sections, and around headings and other special items.
5. Use highlighting techniques such as boldface, italics, and bullet dots. But don't overdo them, and be consistent throughout the document.
6. Avoid using all-capital letters. And avoid overusing initial capitals for common nouns *(this agreement, trust, common stock).*
7. Use diagrams, tables, and charts as needed to help explain the text.

C. Organization

1. Use short sections, or subdivide longer ones.
2. Put related material together.
3. Order the parts in a logical sequence. Normally, put the more important before the less important, the general before the specific, and the ordinary before the extraordinary.
4. Use informative headings for the main divisions and subdivisions. In consumer documents, try putting the main headings in the form of a question.
5. Minimize cross-references.
6. Minimize definitions. If you have more than a few, put them in a separate schedule or glossary at the end of the document.

(The next four items apply to analytical documents, such as briefs and memos, and to most informational documents.)

7. Try to begin the document and the main divisions with one or two paragraphs that introduce and summarize what follows, including your answer.[2]
8. Use a topic sentence to summarize the main idea of each paragraph or of a series of paragraphs on the same topic.
9. Make sure that each paragraph develops the main idea through a logical sequence of sentences.
10. Use transitions to link your ideas and to introduce new ideas.

D. Sentences

1. Prefer short and medium-length sentences. As a guideline, keep the average length to about 20 words.
2. In most sentences, put the subject near the beginning; keep it short and concrete; make it something the reader already knows about; and make it the agent of the action in the verb.

3. Put the central action in strong verbs, not in abstract nouns. ("If the seller delivers the goods late, the buyer may cancel the contract." Not: "Late delivery of the goods may result in cancellation of the contract.")
4. Keep the subject near the verb, and the verb near the object (or complement). Avoid intrusive phrases and clauses.
5. Try to put the main subject and verb toward the beginning; don't pile up conditions or qualifiers before the main clause.
6. Put the strongest point, your most important information, at the end—where the emphasis falls.
7. Prefer the active voice. Use the passive voice if the agent is unknown or unimportant. Or use it if, for continuity, you want to focus attention on the object of the action instead of the agent. ("No more legalese. It has been ridiculed long enough.")
8. Connect modifying words to what they modify. Be especially careful with a series: make clear whether the modifier applies to one or more than one item. (Examples of ambiguity: "educational institutions or corporations"; "a felony or misdemeanor involving dishonesty.")
9. Use parallel structure for parallel ideas. Consider using a list if the items are at all complicated, as when you have multiple conditions, consequences, or rules. And put the list at the end of the sentence.

E. Words

1. Prefer familiar words—usually the shorter ones—that are simple and direct and human.[3]
2. Avoid legal jargon: stuffy old formalisms (*Now comes*; *In witness whereof*); *here-*, *there-*, and *where-* words *(hereby, therein, wherefore);* unnecessary Latin *(arguendo, inter alia);* and all the rest *(and/or, provided that, pursuant to, the instant case).*[4]
3. Avoid doublets and triplets *(any and all; give, devise, and bequeath*).
4. In consumer documents, explain technical terms that you cannot avoid using.
5. Omit unnecessary words.
6. Replace wordy phrases *(prior to, with regard to, in the event that).*[5]
7. Give *shall* the boot; use *must* instead.
8. In consumer documents, consider making the consumer "you."
9. Avoid multiple negatives.
10. Be consistent; use the same term for the same thing, without thinking twice.

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Endnotes

(Articles are by the author.)

1. *Plain English: A Charter for Clear Writing,* 9 T.M. Cooley L. Rev. 1, 11–14 (1992).
2. See *First Things First: The Lost Art of Summarizing,* Court Rev., Summer 2001, at 30.
3. See *Plain Words* (Part One), Mich. B.J., Aug. 2001, at 72.
4. See *Plain Words* (Part Two), Mich. B.J., Sept. 2001, at 72, 73.
5. See id. at 72.

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How do the courts interpret commercial contracts?

Sir Christopher Staughton

Arbitrator; former Lord Justice of Appeal, England and Wales

Editor's note: In Clarity *No 48, we published a paper by Justice Michael Kirby, one of Clarity's two patrons, on the principles of legal interpretation. As many readers will know, Justice Kirby presented a paper on this complex topic at the Cambridge conference in 2002, which Clarity held jointly with the Statute Law Society.*

Discussions between the guest editor and Clarity's other Patron, the Rt Hon Sir Christopher Staughton, a former Justice of Appeal, showed a difference of approach on the same subject. We republish an article on the topic which Sir Christopher published in the Cambridge Law Journal, 58(2), July 1999, pp 303-313. The article was based on a lecture he gave at the University of Cambridge in 1999.

The two patrons met earlier this year, at the Commonwealth Legal Convention, in Melbourne, Australia. By their joint admission, the meeting was friendly!

The title to this paper might be thought to suggest that there is something special about commercial contracts. That is not the case; it is often said, with some degree of truth, that commercial contracts are construed in the same way as any other contracts. If there is a distinction to be drawn in this field, it is between written and oral contracts. The meaning of a written contract is a question of law for the judge, and not a question of fact for the jury; the opposite rule applies to an oral contract.[1] That is strange law. But as contract disputes are never now tried by judge and jury, I leave the reader to ponder on some other occasion over the logic of saying that the meaning of a contract is a question of law. The reason that I confine myself here to commercial contracts is that they are virtually the only contracts which in these days anyone can afford to litigate.

We must ask ourselves why it is necessary to have any law at all on the subject of interpretation of contracts. Why do we not simply read the contract and decide what it means?

There are, I think, four answers to that question. First, it is desirable, and fairness demands, that different judges, and the same judges in different cases, should reach the same answer on any legal question; that is part of what law is about. Secondly, people who make contracts are entitled to know what the courts will say that they mean, if a dispute should arise. Thirdly, it is in the interests of the parties to a contract, and in the public interest, that judges should impose some restraint to prevent time and money being wasted in considering a mass of irrelevant material.

The fourth reason can be found in *Samples of Lawmaking* by Lord Devlin. He wrote that a judge sets out "to ascertain the intention of the parties; but before long he has invented canons of construction and other rules which make things easier for himself but much more difficult for the parties who do not know the rules".[2] I have great sympathy with that somewhat cynical sentiment. A judge, after all, has to give a judgment, and judgments have to contain reasons; unfortunately it is not enough for him to say simply "this is what I think the contract means".

Let us now see what rules the courts apply in the interpretation of contracts. I set out my own views on this topic in an article in 1995.[3] I will quote only four principles from what I then wrote. In case it be thought that what was said in a lecture hall at New York University is not in itself law, it should be noted that these principles also feature in three judgments of mine in the Court of Appeal.

The first was in *Youell* v *Bland Welch* & *Co.*[4] After that there were two successive judgments of mine in the same case, *Mirror*

Group Newspapers v *New Hampshire Insurance Co.* One was given in June 1995,[5] and the second, on 6 September 1996.[6] I enquired why they had not reached the official law reports, and was told that it was not practicable to report complicated cases.

The intention of the parties

Rule One is that the task of the judge when interpreting a written contract is to find the intention of the parties. In so far as one can be sure of anything these days, that proposition is unchallenged. But as we shall shortly see, the intention of the parties does not necessarily mean what they actually meant. Justice Holmes said as much in a celebrated article: "Nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent."[7] That was 102 years ago.

The same theme is to be found in the speech of Lord Hope in *Total Gas Marketing Ltd* v *Arco British Ltd*: "I have reached this conclusion with regret. It seems to me most unlikely that the parties to this agreement intended that it should be capable of being terminated by reason only of the non-fulfilment of the condition...."[8] Lord Steyn *(ibid)* likewise found himself driven to an unattractive conclusion.

The decision in that case is greeted with acclaim by a distinguished commercial lawyer, Mr Brian Davenport QC, in the *Law Quarterly Review*. In a note headed "Thanks to the House of Lords" he writes: "Those who care about the proper construction of agreements, and statutes, must care that words are given their correct meaning and not some artificial meaning to suit a particular result. Everyone must be grateful to the House of Lords for their decision in this case."[9] The reason for Mr Davenport's enthusiasm will soon be apparent.

On an allied topic, interpretation of statutes, Justice Holmes said this:

> While at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English words intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.[10]

The first place where you look for the intention of the parties is in the language which they themselves used. And it is very often the last place too. But does it not follow that each party should give evidence of what his intention was? Certainly not, says the law, we cannot allow that; subjective evidence of intention is not admissible—see the speech of Lord Wilberforce in *Prenn v Simmonds*.[11] There are at least two reasons for that rule, and perhaps three. The first is that what the judge has to ascertain is the *common* intention, not that held by one party or the other *in pectore*. The second, that each party would be likely to give evidence that *his or her* intention was that which suited *his or her* case, and nothing or not very much would be gained by listening to self-serving evidence of both of them. And the third possible reason is similar, that until the *Criminal Evidence Act* of 1898, those accused of crime were not allowed to give evidence in their own defence, as it was feared that the guilty would feel obliged to perjure themselves in their evidence, and it was better for their bodies to be hanged than that their immortal souls should be in peril.

So it is well established that it is the common intention of the parties that must be sought, primarily in the language which they have used; evidence of subjective evidence is excluded, even if it would show, as Justice Holmes predicated, that they both meant something different. (I am of course not talking of the rare cases of rectification.) Lord Hoffmann recently accepted that subjective evidence of intention should be excluded, in *Investors Compensation Scheme* v *West Bromwich Building Society*.[12] In the same speech he also accepted the exclusion of evidence of previous negotiations, which again has the authority of Lord Wilberforce in *Prenn* v *Simmonds*. (One notes in passing that the alleged rule against reporting complicated cases apparently does not apply to the House of Lords.) Lord Hoffmann treated the exclusion of subjective evidence of intention and evidence of previous negotiations as exceptions for reasons of practical policy. I would prefer to say that the evidence is excluded mainly because it is unhelpful. It does

not tell one what one needs to know—the common intention of the parties when the contract was made.

Surrounding circumstances

My second rule concerns the surrounding circumstances, a phrase which in this context dates back at least to the speech of Lord Dunedin in *Charrington & Co Ltd* v *Wooder.*[13] An alternative word is "background", but that is not so precise. Today many lawyers prefer to speak of "the matrix". There are inestimable benefits to be found in the speeches of Lord Wilberforce on the interpretation of contracts; but I hope that I may be forgiven for saying that his introduction of the word matrix (in *Prenn* v *Simmonds)* is not one of them, for counsel have wildly different ideas as to what a matrix is and what it includes. Perhaps that is not surprising since the speech of Lord Hoffmann in the *Investors Compensation Scheme* case. He there said:

> The background was famously referred to by Lord Wilberforce as "the matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties, and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.[14]

It is hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation. In the first of the *Mirror Group Newspapers* cases I said that, as it then appeared to me, the proliferation of inadmissible material with the label "matrix" was a huge waste of money, and of time as well. Evidently Lord Hoffmann does not agree.

Others have since questioned that passage in the *Investors Compensation Scheme* case—see the judgments of Saville and Judge LJJ in *National Bank of Sharjah* v *Dellborg*,[15] and of the Lord President and Lord Kirkwood in *Bank of Scotland* v *Dunedin Property Investment Co Ltd.*[16] I myself returned to the topic in *Scottish Power plc* v *Britoil* (*Exploration) Ltd.*[17] I pointed out that the *Investors Compensation Scheme* case was not concerned with a contract made by any ordinary commercial process; I also said that one cannot tell whether matrix was the subject of discussion in that case, and there did not appear to be any dispute as to what material could qualify as matrix. It may have been something of an over-statement on my part, to say that no authority was cited for such a wide meaning of matrix, as Lord Hoffmann had cited his earlier decision in *Mannai Investments Co Ltd* v *Eagle Star Life Assurance Co*[18] (for another proposition), and in the *Mannai* case he had cited Lord Wilberforce in *Prenn* v *Simmonds* as authority for the matrix doctrine. But Lord Wilberforce went nowhere near saying that matrix was as wide as Lord Hoffmann makes it.

The surrounding circumstances, as I still call them, admissible for the interpretation of a written contract, must have been known, or reasonably capable of being known, to both parties at the time when the contract was made; for each is entitled to know what contract he is entering into; and therefore at that date each must know all facts which will reveal the meaning of the contract. In the *Scottish Power* case I repeated what I had said years before in the *Youell* case as a description of the material that is relevant—"what the parties had in mind, ... what was going on around them at the time when they were making the contract".[19] Lord Kirkwood in the *Bank of Scotland* case adopted a variant of that: "facts which both parties would have had in mind and known that the other party had in mind, when the contract was made".[20] I would amend my version slightly, so that it reads: "what the parties must have had in mind". But it must still be the immediate context, and not facts in the past, distant or even recent.

Unreasonable results

I turn now to my third rule, which is often the most important of all, and certainly is in the present context. It is that the courts can take into account the consequences of one interpretation or another. I would not describe this as background, or surrounding circumstances, or even matrix (but see the judgment of Mance J in *Roar Marine Ltd* v *Bimeh Iran Insurance Co*[21]). It is a wholly separate rule, based on obvious common sense. The point is put with admirable clarity and concision by Lord Reid in *Wickman Machine Tools Sales Ltd* v *L Schuler A*G: "The fact that a particular construction leads to

a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make that intention abundantly clear."[22] When speaking to students I tell them that what Lord Reid said there is something which they should learn by heart. It contains nothing whatever to support a suggestion that the courts, in the interpretation of contracts, may depart altogether from the language which the parties have used. Indeed the contrary view to my mind is a plain inference from what Lord Reid said. What I have quoted earlier from Justice Holmes, writing over a hundred years ago, points in the same direction, as does the passage I have referred to in the *Total Gas Marketing* case in 1998.[23]

But I must now go back to the *Mannai* case. That concerned a unilateral notice by a lessee to his landlord to determine the tenancy under an option available to the lessee. Notice was given to determine on 12 January, when it should have said 13 January. By a majority the House of Lords held that the notice validly determined the lease. As will appear, I have no quarrel with that decision. But I must quote this passage from the speech of Lord Hoffmann:

> The fact that the words are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the parties to mean, even if this compels one to say that they used the wrong words. In this area, we no longer confuse the meaning of words with what meaning the use of the words was intended to convey. Why, therefore, should the rules for the construction of notices be different from those for the construction of contracts?[24]

So it would seem that the courts may override the words which the parties have used, in the process of interpreting a written contract, despite the powerful authorities which I have mentioned.

For my part, I can see an argument for saying that a notice given unilaterally is a different creature from a contract, which reflects the common intention of at least two parties. If that is the case, then the actual decision in the *Mannai* case poses no problem. But if Lord Hoffmann is right, and if unilateral notices are construed in the same way as contracts, then I respectfully part company with Lord Hoffmann's reasons for the decision which he reached as one of the majority. For present purposes it is enough to say that his remarks as to the interpretation of contracts were *obiter,* and not necessary to the decision.

A fine example of the traditional, and in my view justified, approach to avoiding absurdity is to be found in the case of *Segovia Compania Naviera SA* v *R Pagnan & Fratelli.*[25] In the *Segovia* case, a charterparty provided that the charterers could order the vessel to any port in "United States of America east of Panama Canal". The charterers ordered the vessel to New Orleans, in the US Gulf. Now New Orleans, like every other port in the US Gulf, lies to the west of the Panama Canal. So, as a matter of fact, does Miami. It was held by Donaldson J and the Court of Appeal, that the charterparty referred to any port which one would approach from the Caribbean end of the Panama Canal, rather than the Pacific end. That seems to me a wholly legitmate decision on interpretation. The most obvious meaning was rejected, because there would be no rhyme or reason in it; a less obvious but still available meaning of the words used was adopted because it made sense.

Another example is apparently to be found in *Charter Reinsurance Co Ltd* v *Fagan*,[26] which brings to mind Virgil's *Aeneid,* Book 2 line 3. In that case reinsurance contracts required the reinsurers to reimburse the reinsured in respect of their net loss in excess of a specified sum, net loss being defined as "the sum actually paid by the reinsured in settlement of losses or liability. ...". The reinsured had gone into provisional liquidation, and, on the assumed facts, had not paid—I forbear to say actually paid—anything. You might have thought that the words "actually paid" were quite plain, and actually meant, actually paid. You might also have thought that there was no obvious absurdity in that interpretation, particularly in the absence of any evidence that the result was absurd, plus the fact that the insurance industry had been happily using the same form of words for 80 years or more. It could also be mentioned that the House of Lords

had, as recently as *The Fanti and The Padre Island*,[27] decided that some fairly similar wording ("shall have become liable to pay and shall have in fact paid"), in another kind of insurance contract, should be given its apparent meaning. But you would have been wrong. The judge at first instance, the majority in the Court of Appeal, and the five Lords of Appeal, were all of opinion that the contracts did not require the reinsured to have paid before they could recover from the reinsurer. There was only one dissenter, in the Court of Appeal. He thought, and he actually still thinks, that there was no absurdity in the natural meaning of the words; and even if there had been absurdity, there was no other available meaning and the natural meaning must prevail.

I leave this chapter saying that in my opinion business men would prefer a general rule that words mean what they say in ordinary English, rather than a rule that contracts shall mean what the House of Lords, or some of its members, think they ought to mean. Indeed Lord Mustill said as much, in the *Charter Reinsurance* case:

> There comes a point when the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their bargain according to its terms.[28]

His words should be followed.

Market practice

My fourth and last rule which the courts apply in interpretation of contracts concerns market practice. One needs to be a bit careful with words here. Custom, or usage, must be notorious, certain and reasonable,[29] and in effect such as is regarded as binding in the trade in question. Mere trade practice is insufficient.[30] It is rare in modern times to find that a contract is varied or enlarged by custom.

What is much more common is for one or both parties to allege that there is a trade or market practice as to how contracts are performed, which is said to show what their meaning is. This gives rise to two problems. First, there is again a strong probability that the expert witness for one side will say one thing, and the expert witness for the other the opposite, each with his supporters and able to quote examples. Leggatt J in *Vitol SA* v *Esso Australia Ltd* said this:

> "It seemed to me that both experts were in an invidious position. ... Each witness was in fact giving no more than his understanding of the legal requirements of contracts of this nature. Neither witness came within hailing distance of establishing anything in the nature of a custom."[31]

All too often that is the case, and the money and time spent on expert evidence of market practice are entirely wasted. Mance J took the same view in the *Roar Marine* case, although he took custom and practice together despite the notable difference between them. He said: "For there to be any relevance in custom or practice, whether in a strict or informal sense, it must be possible to identify the particular custom or practice with some certainty."[32]

The second problem is that, in my view, it is doubtful whether much of the evidence described as market practice is admissible. Can it qualify as a surrounding circumstance, or matrix? If its effect is merely that some, or many, or even all traders in a particular market interpret the contract in a particular way, that to my mind is not a surrounding circumstance; and in any event the parties to *this* contract may not know how others, or some and if so how many others, would interpret it.

Where, however, the market practice proved is not direct evidence of the meaning of the contract, but rather evidence of how the market operates, it may well be that such evidence is admissible. For example, it might be proved that insurance brokers commonly produce a slip and insert the wording they require; that they take it to a potential leading underwriter; that he may add to or alter the wording, and quote a rate, and

sign for a proportion of the risk; that the broker then takes the slip to other underwriters, in the hope that they too will take a share; and that if the slip becomes over-subscribed it may be signed down by the broker. (I hope that I correctly state the practice.)

That is an example of matters which in my view probably could be proved in evidence—if they were not known to the judge already—and which could, in a given case, have an effect as surrounding circumstances or background. In my article in the *British Insurance Law Association Journal*[33] I fear that I may have gone too far in limiting evidence of market practice; but still the amount of such evidence which is both relevant and helpful is but a small proportion of the evidence which is in fact tendered for purposes of interpretation. Such evidence of how the market operates may have been what Lord Mustill had in mind when he referred to the wording of a policy being "read against the background of market practice".[34]

Conclusion

There is much else that I could say about the interpretation of written contracts, for example about the rule that you cannot rely on facts arising or coming to the knowledge of the parties after the contract was made, as an aid to its meaning. But here I have sought to set out the principal tools which the courts use for the interpretation of contracts; you are to find the intention of the parties, and for that purpose you look first at the wording of the contract and see what it says. You do not ask the parties to tell you what they thought it meant. Secondly, you may look at the surrounding circumstances known to both parties, that is what was going on around them when they made the contract. Thirdly, if there is evidence that the ordinary meaning of the words would lead to an absurd result, you must consider whether they can reasonably bear some other meaning. Fourthly, the court may look at evidence of how the market works, if it does not know already, and at any custom which is commonly regarded as binding on everyone in the market. But you may not look at what people in the market think the contract means, however many there be of that persuasion, except perhaps in the case where words are used in a special and unusual sense.

Endnotes

1. *Cf. Torbelt v. Faulkener* [1952] 2 TLR 659 (oral contract) and *Pioneer SS Co Ltd v BTP Tioxide Ltd* [1982] A C 724. See further Lewison, *The Interpretation of Contracts*, 2nd ed, 1997 pp 67-68.
2. At p 31.
3. (1995) 26 J MarL & Com 259.
4. [1992] 2 Lloyd's Rep 127.
5. [1996] 5 Re LR 103.
6. (1997) LRLR 24 and [1996] CLC 1728.
7. "The Path of the Law" (1897) 10 Harvard L Rev 457.
8. [1998] 2 Lloyd's Rep 209, 233.
9. (1999) 115 LQR 11.
10. *Northern Securities Company v United States* (1904) 193 US 197.
11. [1971] 1 WLR 1381, 1385.
12. [1998] 1 WLR 896, 913.
13. [1914] AC 71.
14. [1998] 1 WLR 896, 912.
15. 9 July 1997, unreported.
16. 1998 SC 657, 1998 SCLR 531.
17. 18 November 1997, 94(47) LSG 30, 141 SJLB 246, The Times, 2 December 1997.
18. [1997] AC 779.
19. [1992] 2 Lloyd's Rep 127, 133.
20. 1998 SC 657; 1998 SCLR 531, 544.
21. [1998] 1 Lloyd's Rep 423.
22. [1974] AC 235, 251.
23. [1998] 2 Lloyd's Rep 209, 223; see n 10 above.
24. [1997] AC 749, 779.
25. [1997] 2 Lloyd's Rep 343.
26. [1997] AC 313.
27. [1991] 2 AC 1.
28. [1997] AC 313, 388. *Cf* Lord Bridge in *AIS Awilco of Oslo v Fulvia SpA di Nav of Cagliari (The Chikuma)* [1981] 1 WLR 314, and the decision in *Kuwait Airways Corporation v Kuwait Insurance Company* (11 March 1999), where Lord Hobhouse of Woodborough said: "But it must in any event be stressed that it is not for the courts to tell the parties what contract they should have made nor, after the event, to evaluate the merits and demerits of their bargain. If, as here, the parties have used plain language to express their intention, that should be an end of it: the courts should enforce the contract in accordance with its terms."
29. *Chitty on Contracts*, 27th ed (1994) para 12-114.
30. *Ibid*. See also *General Reinsurance Corporation v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856, 874.
31. [1989] 1 Lloyd's Rep 96, 100.
32. [1998] 1 Lloyd's Rep 423, 429.
33. British Insurance Law Journal, May 1998, no 97 p 5.
34. *Touche Ross & Co v Baker* [1992] 2 Lloyd's Rep. 207, 210.

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Editorial postscript— some Australian developments

The principles raised by Sir Christopher in his article and those raised by Justice Michael Kirby in *Clarity* No 48, frequently come before the courts. A recent Australian example is the decision of the New South Wales Court of Appeal, *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74. At issue was the meaning of the term "successful". A contract provided that, if a certain bid to redevelop a large football stadium was "successful" then the appellant was entitled to be appointed manager of the stadium. The appellant sought to introduce evidence of the circumstances surrounding the entry into the agreement. This included negotiations between the parties in the period before the bids were submitted, the negotiations at about the time the bids were submitted, and the negotiations after the bids were submitted. This resulted in a trial of seven days of oral evidence, and 2524 pieces of paper placed before the judge, including not only the substantial agreements and various drafts of them, but "almost every piece of paper which passed between the parties".

This caused the Court of Appeal to consider the relevant principles of legal interpretation. According to Young CJ in Eq (at para 36):

> Under what Lord Hoffmann would doubtless call "the old rules of legal interpretation" almost none of this material would have been tendered and the case would doubtless be over in half a day. That is because 50 years ago courts paid great respect to the rule that if parties had put down their contract in a written document, one construed their writing and the parol evidence rule was applied to exclude extraneous material. That may have been too draconian an approach. However, the reverse approach which permits every piece of paper to be put before the court is causing tremendous expense in commercial litigation. That expense might be justified in a case such as the present where something like $4.5million might be at stake. However, it is not at all uncommon for the same approach to be used in small commercial disputes involving amounts not greater than the [jurisdictional limit of the] District Court ceiling."

Young CJ in Eq then discussed Lord Hoffmann's principles in the *Investments Compensation Scheme* case. He also referred to a later case, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, where at page 269 Lord Hoffmann had "clarified" some of what he had said in the *Investors Compensation Scheme* case. In the 2002 case Lord Hoffmann said:

> "I should in passing say that when in *Investors Compensation Scheme* …I said that the admissible background included 'absolutely everything that could have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*. I was merely saying that there is no conceptual limit to what can be regarded as background. … I was certainly not encouraging a trawl through "background" which could not have made a reasonable person think that the parties must have departed from conventional usage."

In Australia, the leading discussion of these matters is probably that of Mason J in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337. At 352, Mason J said:

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although as we have seen, if the facts are notorious, knowledge of them will be presumed.

In the latest word from the Australian High Court, *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436, five members of the Court said it was unnecessary to determine whether the House of Lords in *Investors Compensation Scheme* and *Bank of Credit and Commerce International* "took a broader view of the admissible 'background' than was taken in *Codelfa*, or if so, whether those views should be preferred by those of this Court. Until that determination is made by this Court, other Australian courts, if they discern any inconsistencies with *Codelfa* should continue to follow *Codelfa*."

Two leading Australian academics, Professors J W Carter and Andrew Stewart, in an article published in (2002) 18 *Journal of Contract Law* 182 at 186, state the view that the High Court's decision in *Royal Botanic* does little to settle the controversy which surrounds the reception of evidence of surrounding circumstances as an aid to interpretation. The authors comment:

> "It seems almost bizarre that at the beginning of the 21st century there should still be uncertainty as to such a basic issue of contract law."

Peter Butt
Guest editor

Promotion of Clarity's President, Peter Butt

Justice Michael Kirby, one of Clarity's esteemed patrons and a Justice of the High Court of Australia, writes:

The retiring President of Clarity, Peter Butt, has defied the received wisdom that a prophet is without honour in his own country. Australia's oldest University, the University of Sydney, has promoted him to a Personal Chair in Law, a rare and much prized accolade. Until his promotion, Peter Butt was an Associate Professor.

His main discipline lies in land law. However, in the 1990s, with Professor Eagleson, then of the English Department at the University of Sydney, he helped establish the Centre for Plain Legal Language. He has pioneered this topic in Australia.

In addition to his teaching and research duties, he is the editor of a regular section in Australia's leading monthly legal journal, the *Australian Law Journal*. His articles on "Property and Conveyancing" keep Australian lawyers up to date with developments in land law and practice. This area of the law has recently become even more complex in Australia because, following decisions of the High Court of Australia, recognition has been given to the 'native title' rights of the indigenous people, Australian Aboriginals and Torres Strait Islanders. Professor Butt has played a key role in analysing and explaining for lawyers and others the process of grafting the new notions onto traditional common and statutory law affecting property rights.

Quite frequently, as befits the President of Clarity, Peter Butt has used his columns in the *Australian Law Journal* to promote the objects of Clarity. In a recent issue of that Journal, he described the progress that had been made in the past decade: P Butt, "Plain language in conveyancing and property documents" (2003) 77 *ALJ* 345. He acknowledges the resistance to plain English in a number of judicial and other circles but also the defects of some attempts at plain language documents and statutes. But he concludes on a note of optimism. Collected in the article are about fifty very simple hints (drawn from an article by Professor Joseph Kimble) on "the elements of plain language". They should be on the pinboard of every judge and practising lawyer.

Professor Butt's professional promotion, in a year in which he has served as President of Clarity, is a personal recognition for a fine scholar and a powerful Antipodean exponent of an important new idea in the law.

Michael Kirby
Patron of Clarity

Numbers: figures or words
A convention under the spotlight

Robert Eagleson
Plain English consultant; formerly Associate Professor of English Language, U. of Sydney

In *Clarity* No 49 we presented all numbers as figures, not as words, even single- and double-digit numbers:

This step was tackled in 2 ways.

This article explains why we abandoned the convention on numbers.

The advantages of figures

In legal documents—as in most documents—it is the quantity or value expressed by a number that is significant for readers. Printing numbers as figures rather than as words helps readers grasp the message more readily. A figure stands out sharply from the rest of the text, as this example illustrates vividly:

> A wealthy father cut the throats of his four daughters ... killed the girls, aged nine, 12, 14 and 18

The age of the first child is lost among the words whereas the other 3 can be identified immediately.

Moreover in calculations we are used to dealing with numbers as figures rather than as words. Using words for numbers moves readers into less familiar patterns.

There is a subsidiary advantage in allowing all numbers to appear as figures rather than insisting that some must appear as words. Writers are not burdened with trying to remember and cope with arbitrary rules and so can concentrate on the critical goal of achieving clarity. The less we distract them from this task with unnecessary variations the better the results.

A teetering convention

For all its widespread acceptance among writers and editors, the convention that certain numbers must occur as words has a strong streak of irrationality about it. Its persistence despite this attribute probably arises because few have closely analysed formulations of the convention but have simply bowed to it on the word or command of others.

To avoid the possibility of bias in the selection of a formulation, I reproduce a statement of the convention as it appeared in *Clarity* No 29 (page 14):

> Where science and mathematics are not involved, the best practice is to spell out all numbers, cardinal or ordinal, smaller than 101. (Another common practice—the convention followed in science and mathematics—is to spell out only numbers smaller that 11; this less formal practice is perfectly acceptable in legal writing.)

This was reprinted from Bryan Garner's *The Elements of Legal Style* (though he may simply have been setting the convention out and not necessarily advocating it). It is not idiosyncratic and can be found in similar if not exact formulations in most house style manuals. (Some put the boundaries for words to be used at numbers smaller than 100 and 10.)

Displayed in cold light like this, the convention becomes puzzling. It immediately prompts the question why the rule applies only to single- and double-digit numbers. If 8 and 88 have to appear as words, why not 888?

Again, if double-digit numbers can be liberated to appear as figures in mathematical documents, why cannot single-digit figures be freed also? Surely *4 days* is more in keeping than *four days* with the nature of a mathematical work? It certainly would be preferable in a legal text. The mind boggles at such fastidious distinctions.

Equally puzzling is the insistence that in texts other than science and mathematics numbers are best spelt out. The [Australian] *Style Manual* (AusInfo: Canberra 1998 fifth edition: 185) provides a clue:

> Words are preferred…in descriptive and narrative texts where figures would be unduly prominent and generally unsympathetic to the flow and appearance of the text.

This is highly subjective given that the *Style Manual* restricts the rule to numbers under 100 (page 189). Wouldn't 4,257 be even more unsympathetic! It is somewhat precious, perpetuating the myth that figures are too forbidding for the artistic.

It is also becoming an unsteady convention. My impression is that more and more in Australia are limiting the rule to numbers under 10 in all types of texts. *The Australian Journal of Linguistics* states in its house-style:

> Numbers from one to nine should be written out in full: figures should be used for numbers above 10.

The Sydney Morning Herald, a major newspaper, exhibits the same practice:

> …a spiral ramp nearly 35 metres long
> (2 August 2003)
>
> Over the past 20 years…
> (2 August 2003)

Random questioning of writers confirms that this is their notion of the convention. Perhaps the drift will continue until all numbers are presented as figures. Since people have been prepared to exclude 10-99 from the ambit of the convention, it is surprising the final step has not already been taken.

A neglected modification

The last part of the formulation of the convention in *Clarity* No 29 introduces a modification:

> When, in the same context, some numbers are above the cut-off point and some below, the style for the larger numbers determines the style for the smaller ones.

The amendment is commendable but many are either not aware of it or do not support it. Here are just 2 examples picked up in casual reading in the days before I was preparing this article:

> WCM, which employs 85 nationals and five expatriates, runs grassroots community activities in around 160 remote rural communities.
>
> *Go (continue 2003) 12*

> There were 16 people in our group—14 paying customers and two guides.
>
> *The Sydney Morning Herald 19 July 2003*

It would appear that the base form of the rule has become so firmly ingrained that many follow it rigidly, unaware of its scope for some variation.

A host of exceptions

While advocating the rule, most style manuals proceed to list copious exceptions. The article in *Clarity* No 29 had 5; other manuals run to 8 or 10. They include:

- dates: 7 August 2003—not Seven August two thousand and three
- monetary amounts: $5—not $ five
- percentages: 5%—not five %
- fractions: 4.3.

On the basis of these exceptions—or loopholes—a lot of numbers end up as figures in texts. Why then bother with the rule at all? If so many numbers can appear as figures, why not let all of them?

In the beginning

In her article in *Clarity* No 49 (page 5), Claire Grose began a sentence—and a paragraph—with a figure:

> 3 examples of changes to the law … demonstrate some of the benefits …

According to the convention this is taboo. 'Always begin a sentence with a word, not a figure' (*The Little Book of Style* page 69). But as so often in the plain language environment, one is constrained to ask 'Why not?'

Perhaps the prohibition on figures at the beginning of sentences is an issue of typographical of design taste: in the past people may not have liked the look of figures in the first position, just as the first paragraph used not to be num-

bered in a document, with the numbering starting only at the second paragraph. It cannot be that sentences are supposed to begin with a capital. Such a rule can only apply to words that do not normally begin with an upper case letter. The concepts of upper and lower case do not apply to figures: they are both or neither. Nor can the objection to having a figure at the beginning of a sentence be based on the fact that a single-digit number might look too nondescript, because many sentences already start with a single letter—I or A—not to mention the poets' O (which tantalisingly could also represent the mathematicians' zero).

A book on theology, N Weeks *The Sufficiency of Scripture* (Edinburgh: 1988), offers an interesting, if unintended, illustration of the issue. Following custom, the publisher, Banner of Truth Trust, does not italicise the individual books of the Bible, with the result that we find sentences such as:

- Hebrews is full of arguments from Old Testament history. (page 48)
- Psalm 17 is the most interesting of them. (page 17)

However, some books of the Bible occur in pairs or triplets, for example 1 Samuel, 2 Samuel, 3 John. The publisher has grasped the nettle and allowed these books to appear at the beginning of sentences also:

- 1 Corinthians 15:21, 22 confirms Paul's approach… (page 109)

This is a far better solution than having to switch, as we did in the past, to clumsy circumlocutions such as:

- Verses 21 and 22 in 1 Corinthians 15 …

How unremarkable and inoffensive the solution is comes to light when a sentence beginning with a figure occurs in the midst of a paragraph:

- We are told of the disease in his old age (v.23). 2 Chronicles 14-16 is also a description of Asa's reign. It is clearly based on the account in Kings… (page 57)

An open-minded perspective

I do not regard this matter as a major battleground in plain language but its exploration exposes how we can lapse into accepting—and even maintaining—conventions uncritically—conventions that only place fetters on language, hampering it from fulfilling its real purpose of transmitting a message clearly and enlightening others.

Nor does it bother me that plain language practitioners move to figures while others in the community hold to the old convention. Having both practices in operation would not create any disturbance for readers. After all we already cope with variation in texts comfortably. We adjust readily to different practices in spelling when reading American texts (*installment* for *instalment)*, and to different senses when reading British texts (*spring* referring to March-May). There is some point in requiring consistency within a document but not across documents or continents.

When the drive for plain language sprang to life in the 1970s, we were constantly confronted by the argument that 'you cannot change this clause. This is the way it has always been written'. If we had not challenged this adherence to convention, there would be no plain language documents today. We should adopt the same pose with numbers. There is no principled reason that they should not all appear as figures. Certainly we should not block authors if they want to use figures or look down on them as if they acted in ignorance. On the contrary, they are showing a commendable preference for plainness over empty tradition.

It is instructive how few people notice—or comment—when all numbers occur as figures in a document. I suspect that, if we abandoned the convention quietly and without fuss, within a short time everyone would have forgotten its existence, as has happened in our plain language experience with so many other conventions. It serves no real purpose in conveying meaning or helping readers.

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Relative clauses:
the "that/which" debate

Richard Castle

Lawyer; legal drafter

Background

Have you ever wondered why your computer program insists on a comma before "which" when instinct tells you it's wrong? The reason lies in a convention which parts of the English-speaking world (notably the USA) have elevated into a grammatical rule. The rule focuses on the usage of "that" and "which" in relative clauses.

The so-called rule

The main grammatical rule can be expressed in two parts, as follows.

(1) *Defining*

Where the relative clause defines the noun, always use "that" and always omit commas. Take for example—

> The books that are in my library are included.

Here the books referred to are those and only those in my library.

(2) *Describing*

Where the relative clause merely assigns a quality to the noun, always use "which" and always put commas round the relative clause. Hence—

> The books, which are in my library, are included.

In this instance, the relative clause merely tells where the books happen to be. Their description or definition lies elsewhere. The words between commas could be left out and the sentence would still have meaning. The relative clause adds some quality to the noun.

The problem with the rule

The difficulty with this principle, like so many other language rules, is that it doesn't work. English will not be dragooned into following rules of this sort. Moreover, those who propound them eventually trip up. The same drafting office which includes the rule in its drafting manual has written:

> Delegated legislation that was once looked on with scepticism and disdain, is now accepted as both necessary and appropriate.

Surely the phrase "that was once looked on with scepticism and disdain" is descriptive rather than definitive. If that is right, then according to the rule the sentence should be rewritten with an additional comma like this:

> Delegated legislation, which was once looked upon with scepticism and disdain, is now accepted as both necessary and appropriate.

Commentators on the rule

Henry Watson Fowler considered that there would be a considerable gain in both lucidity and ease if writers observed the rule "but it would be idle to pretend that it is the practice either of most or of the best writers". His current successor as editor of *Fowler's Modern English Usage* is Robert Burchfield, a native of New Zealand. He identifies three broadly distinctive types of "that" and "which" relative clauses, and by implication rejects the two-part rule. *The New Oxford Dictionary of English* (1998) takes a pragmatic line, saying that in defining relative clauses, either "which" or "that" may be used; but in the describing type of relative clause, "that" cannot be used. In other words, "which" can never be wrong: a proposition which would come as a shock to many English speakers outside England.

Why there is no rule

Apart from the simple (and in itself conclusive) fact that users of the language will not follow the rule, there are other reasons why the distinction is not and can never be hard and fast.

The call for variation

Sometimes it is necessary to construct sentences with a relative clause within a relative clause, like this:

> The master of a foreign ship that has certificates that can be recognised by the Director must ensure…

In these cases it will be more elegant to vary the introduction to one of the relative clauses. Similarly, if a "that" is used nearby as a pronoun, adjective, adverb or conjunction, a "which" will be called for in the relative clause. Thus—

> It is simply that the rule of law as the foundation of a democratic society requires legislation which can be understood and applied.

The need for consistency

There is no possessive of "that" equivalent to "of which" or "whose". So if a sentence calls for "of which" or "whose" the standard relative clause must start with "which" rather than "that". Consider the following definition:

> "New ship" means a ship the keel of which is laid or which is at a similar stage of construction on or after the date this Part came into force.

If the "rule" mentioned earlier really was a rule, the second "which" would be "that". The effect would be at best uneven. Similarly, "which" can be preceded by a preposition, whereas "that" can not. So for consistency "which" may have to be employed instead of "that" as in—

> A shared ownership lease means a lease which is granted on payment of a premium or under which the tenant will or may be entitled to…

References to individuals

No general objection can be made to "whose" when the characteristic belongs to something inanimate, as in:

> A ship whose keel is laid is a new ship.

But the converse use of "that" to refer to an individual seems unnatural to the English ear. Accordingly when the person referred to may be either a corporate body or a natural person, "which" as a parallel to "who" is used, as in—

> The Minister must operate a rescue centre for any person which or who is, or is believed to be, in distress at sea.

Very often the "who is" or "which is" can be left out altogether from the defining type of relative clause with no loss of precision and some gain in comprehensibility. Perhaps the provision cited above could have been better written:

> The Minister must operate a rescue centre for any person in distress at sea or believed to be in distress at sea.

Conclusion

There is and can be no rule about the use of "that" and "which" as the introductory word to a relative clause. The most that can be said is that some parts of the English-speaking world prefer "that" (USA, Australia and New Zealand) whereas others prefer "which". Certainly there are times when a computer program's insertion of a comma before "which" must be overridden.

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Phil Knight on hereby

Lawyer, adjunct professor of law, legal drafter

Clarity No 49 reprised a range of opinions about the use of *hereby* in legal writing, with Don Revell arguing that it "is not obsolete, nor is it legalese". On both points, he appears to be correct: none of the major English language dictionaries suggest it is obsolete, and none of the major legal dictionaries suggest it has any uniquely legal meaning. It means exactly what it says—"by this here".

I have long avoided its use because it sounds to my ears like a rank bit of legalese. But on reflection, I think the problem may be that, like so much strictly "legal" vocabulary, people use it because they imagine it makes them "sound legal" instead of using it to do its job. The resulting overuse and unnecessary use, combined with the unfamiliarity of the word in most other contexts, may be what has led to the near universal condemnation of the word. But neither personal opinion, nor misguided overuse, justify abandoning a word, if it indeed performs a useful function, and adds to certainty of a legal text.

Don Revell asserted that "its elimination makes the law less clear when bodies are being established". He would prefer that the *Constitution Act* read

> The Legislature of Ontario is hereby established

because that indicates by what instrument the establishment is effected, rather than

> The Legislature of Ontario is established

which might be misinterpreted as merely a statement of pre-existing fact.

His suggested misinterpretation of the second alternative is somewhat disingenuous. As Chief Legislative Counsel for the Province of Ontario, Don knows better than most of us that statutes do not contain non-legislative statements, and are never interpreted as if they were introducing a random statement of pre-existing fact, inserted just in case the reader was uninformed on that point. There is no danger that the second alternative would be interpreted as if it read: "Oh, by the way, the Legislature of Ontario is an established entity, you know". It will always be understood that the *Constitution Act* itself was establishing the legislature.

In fact, in Canada the *Constitution Act* actually uses the words "There shall be one Parliament for Canada". It does the same for the Ontario Legislature. I find it difficult to believe that Don, or anyone else, would conclude, because the *Constitution Act* omits the words "By this here Act ... " that it was not establishing Parliament and the Ontario legislature, but merely telling us a story about plans for each of them in the future.

In correspondence with me on this subject, Don argued that *hereby* should be edited out during any revision subsequent to enactment. He wrote:

> The consolidation or revision continues an existing state of the law.
>
> By the time the revision is being prepared, the corporation is in existence and the only appropriate statements are to say that the corporation "is established" or that it "is continued".

In the context of the rules of statutory interpretation, this undermines Don's earlier argument. Each statute is a continuing statement of the law, speaking always in the present tense. Therefore, from the stroke of a second past midnight on the date of coming into force of the statute, the institution being established by the statute has already been established (past tense), and the *hereby* (which imputes a present action) is forever after misplaced. Don's argument for removing *hereby* from a revision is sound, and it is the most convincing argument for not using the word in the first place.

Like statutes, all stipulative legal texts (regulations, contracts, wills, etc) speak continuously in the present tense. The word *hereby* is present indicative, telling by what action, instrument or statement a legal result is being effected. Using a present indicative word to tell how such a result is being effected makes sense if the statement is made in passing. "With this ring, I thee wed" is a logical statement, because the

words are said only once, when the ring is given. But achieving a legal result, whether it is establishing a Parliament, bequeathing Blackacre, or releasing a recreation provider from liability, is always a singular event. To write in a continuously speaking document "By this here document, the legislature is established" does not make sense, because logically, the document repeats the establishment again and again every time the words are read.

I cannot agree that the inclusion of *hereby* improves certainty in the manner Don has suggested. On the contrary, its use in most stipulative legal texts is both grammatically inconsistent and logically absurd. I agree with Bryan Garner's suggestion, in *A Dictionary of Modern Legal Usage* (2nd edition), that it is a "Flotsam Phrase", taking up space without adding to the meaning of the sentence. Its redundancy is most readily recognizable when it is replaced in the sentence by its ordinary meaning. Show me a place where you would be comfortable writing " By this here sentence I am making my argument" and I will show you a place for *hereby*.

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Conjunctions in :LISTS

Robert Eagleson

Plain English consultant; formerly Associate Professor of English Language, U. of Sydney

In discussing conjunctions in lists in his article 'Some thoughts on lists' in *Clarity* No 49:29-30, Richard Castle animadverted on a procedure that has been adopted by some in Australia:

> 1 parliamentary counsel office stipulates that a linking word (usually either 'and' or 'or') should be inserted after every item in a list unless there is a good reason not to. *(then quoting the office's manual)* 'If they appear only after penultimate paragraphs, users might be prompted to apply the linking word only to the last 2 paragraphs.'

He observed that 'this rule is not one which commends itself either to the general writer of standard English or to parliamentary drafters in other jurisdictions. Its use makes the text seem unduly fussy.'

However, the practice is rooted firmly in plain language principles. During investigations into writing legislation in plain language, we discovered that a sizeable proportion of readers—including senior bureaucrats—interpreted lists in the form of:

a) ……;

b) ……;

c) ……; or

d) ……

as '[(a) and (b) and (c)] or (d)'. The serious consequences following this interpretation led us to introduce the rule cited by Richard. It was a response to the needs of the audience: the central reason behind any decisions we take in plain language. To ignore readers' difficulties—exposed either by their practice or in testing—is to abandon our principles.

There was independent evidence to support the action. In handling university examinations, I had discovered quite separately that when confronted with question of the form 'answer 1 of the following: (a) (b) (c) or (d)', some 20% of the students answered all 4. Their conduct is explicable: the pressure and stress of the examination had induced their error. When the practice was adopted of inserting an outsized OR into questions of this type to result in '(a) OR (b) OR (c) OR (d)', the error disappeared. This is a neat confirmation from elsewhere that the rule adopted for legislation was both necessary and effective.

It has been taken up by some private legal firms and individual lawyers as well.

Is it standard English?

The procedure may not be the more frequent practice—the norm—in general writing but it does not breach any rules of English grammar, and it does occur in the works of authors, such as Jane Austen, Ernest Hemingway, William Faulkner, Graham Greene, James Joyce, Somerset Maugham, and Alan Paton, to name just a few. A couple of examples:

- For thirteen years had she been doing the honours, and laying down the domestic law at home, and leading the way to the chaise and four, and walking immediately after Lady Russell out of all the drawing-rooms and dining-rooms in the country.

  Jane Austen *Persuasion*

- He smiled and took her hand and pressed it…Cabs and omnibuses hurried to and fro, and crowds passed, hastening in every direction, and the sun was shining.

  W Somerset Maugham *Of Human Bondage*

- I have forgotten their names—Jacqueline, I think, or else Consuela, or Gloria or Judy or June.

  F Scott Fitzgerald *The Great Gatsby*

The Bible also provides an example:

- Terror and pit and snare confront you.

  New American Standard Bible *Isaiah 24:17*

Admittedly the authors were striving after a special effect, but so are we seeking a particular outcome for readers.

Even if there was not this support from literature, I would still be prepared to adopt the procedure of repeating the conjunctions on the

grounds that it is better to rescue readers from misinterpretation than to hold rigidly and inflexibly to a convention of language.

Is it fussy?

Much depends on whether we are drafters or readers. While drafting a document, the practice can seem tedious and monotonous, especially if there are many lists. But readers are less likely to be aware of the tedium. Frequently they consult only 1 section at a time. Even if they consult several sections, they concentrate on the content and the repetition of the conjunctions serves as an aid to understanding. When it comes to who we should be considering, drafters do not—and should not—feature large.

A minor, supplementary benefit

Lists can contain many items and can spread over to the next page. Repeating the conjunction after each item can save readers having to turn over the page to discover whether the list is accumulative or exclusive.

The 3 possibilities

The approach yields 3 forms depending on whether the list is accumulative (when all items must be included), exclusive (when only 1 item operates), or open-ended (when any or all of the items can be taken into account).

Accumulative	*Exclusive*	*Open-ended*
a) ……..; and	a) ……..; or	a) ……..
b) ……..; and	b) ……..; or	b) ……..
c) ……..; and	c) ……..; or	c) ……..
d) ……..	d) ……..	d) ……..

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A drafting note...“and” means “or”?

A trap for drafters is the careless use of “and” and “or”. As readers will know, many decisions have held that, depending on context, judges can construe “and” to mean “or”, and vice versa.

A recent example comes from the New South Wales Court of Appeal: *Victims Compensation Fund v Brown* (2002) 54 NSWLR 668. At issue was the phrase (in legislation providing compensation to victims of crime): “Compensation is payable only if the symptoms and disability persist for more than 6 weeks.” Did a victim need to prove that *both* symptoms *and* disability persisted for more than 6 weeks, or was it enough to prove that *either* symptoms *or* disability persisted for more than 6 weeks?

In a majority decision (2/1) the Court held that “and” in the context of this statute meant “or”—or almost. In essence, the decision was that “symptoms and disability” was a “composite” or “portmanteau” phrase (the court attributed the expression “portmanteau” phrase to Bennion, but it came originally from Humpty Dumpty in Carroll’s *Through the Looking Glass*). The drafter had used a pair of words where one would have done; reluctant to use one word, he or she had used two, “with the comforting feeling that a pair of terms somehow conveys more than the sum of its parts” (again to quote Bennion).

The lesson is clear: be careful with “and” and “or”. You must ensure not only that you (as drafter) know what you mean by the word you have used, but also that readers (including judges) know what you mean.

Peter Butt

Letters to the editor

Clarity's new look

Christine Mowat, Edmonton, Canada

Clarity No 49 blew in like a fresh breeze. With plenty of white-cloud space and an artistic design, the new-look title page allows readers to breathe and think.

Here are thoughts about features I liked in the issue:

- *Clarity* became prominent and the eye fell immediately upon it—instead of the three items vying for attention: "A movement to simplify legal language", "From the Chair", and the "CLARITY" logo against the square of legalese.
- The simple semantic change from "A movement to simplify legal language" to **Journal of the international movement to simplify legal language** makes the subtitle more appropriate. Yup! It's a journal.
- The Contents panel, renamed **In this issue**, no longer reads like a piece of legislation with Sections 1, 2, 3 etc. Now I am drawn to the image-evoking and specific subtitles. The unboxing of the Contents makes the whole layout cleaner.
- The inside cover ensures the continuity of the CLARITY logo and identity. Yet mirroring the design there with "Clarity . . . the Journal" is a fine touch.
- In the article titles, the unusual layout and word size differences are pleasing. Someday we may even have visuals in our journal, other than tables . . . Some readers may have overlooked the clever conjunction of design and meaning in certain titles, for example, "Some thoughts on LISTS" with bullets beside the LISTS. The "hereby" title suggests a rocky road. Some may not take to the inconsistency of title fonts and sizes. I thought it was fun.

Like most people, however, I draw a line somewhere. I did find the editors' decision to use figures for numbers under 10 an obtrusive and non-standard usage. Examples included:

> " the 3 stages of the Simplification Program" (p. 4)
>
> " a 1-person owned and controlled corporate identity" (p. 5)
>
> " the first 2 Acts" (p. 17)
>
> " . . . said 1 interviewee" (p. 26)

And worst of all:

> " 1 thing is sure: at 296 pages, we just met the goal" (p. 28)

Starting a sentence with a number is like going to a dinner party bare-chested. (Note gender-neutral usage.) And with the winds of change, well, . . . brrrr.

Words as numbers

Donald Revell, Toronto, Canada

1 notices that *Clarity* is now using numerals at the beginning of sentences. I do not agree with this decision. Instead of making the text easier to read, it makes it harder. Virtually all of your audience has been taught since grade school that where a number appears at the beginning of a sentence it should appear in words. As a result the use of numerals becomes a distraction—rather than an aid to reading, as the reader subconsciously wrestles with the rules of grammar rather than concentrating on the text.

I fail to see the advantage of "1 Parliamentary Counsel Office..." over "One Parliamentary Counsel Office...". In fact, because of the typographical similarity between, "1" and "I" and because of a lack of context at the beginning of the sentence, the use of the numeral hinders the reader rather than assists him or her. This is in addition to the distraction caused by using a device that is foreign to the average reader's usage.

Book reviews

Drafting Trusts and Will Trusts

James Kessler
Published by Sweet & Maxwell
Sixth edition August 2002
Hardback and CD-ROM £99.00 + VAT

ISBN 0 421 739 104

In Clarity *No 49, we noted the publication of this book, by Clarity member James Kessler.*
We now publish a review of the book, by Clarity's New Zealand representative, Richard Castle.

The fact that this is the sixth edition speaks for itself: the book is good and in demand. Whilst the central core concentrates on high-value trusts, several other chapters provide fascinating insights into drafting and interpretation generally.

After opening chapters on first principles and style (themselves thoroughly absorbing) the author turns to principles of interpretation. This part deserves to be printed as a stand-alone essay and made compulsory reading for every lawyer. Naturally, Lord Hoffmann's words in the *Investors' Compensation Scheme* case take pride of place here. By skilful exposition, the author makes it crystal clear that:

- the old so-called "rules of construction" should be treated with the utmost caution—they are signposts, not the destination itself
- there is a crucial distinction between the meaning of words and the meaning of a document
- in matters of construction, case law is not binding.

In fact, this book makes the last point extremely well, ending the passage by quoting Lord Hoffmann again:

> No case on the construction of one document is the authority on the construction of another, even if the words are very similar.

But Mr Kessler does not leave it there, asking and answering the inevitable question: how *does* one ascertain meaning?

The author is admirably direct and does not sit on fences. To repeat the name of a party to a deed because that party wears more than one hat is "uncouth" (p122). The words "in this deed called" or "here called" (when labelling named persons) are "tiresome" (p130) as is the habit of listing beneficiaries in a schedule (p128). Italicising or capitalising defined expressions wherever used results in "rather messy typography" (p129). Other examples are: "Permanent endowment is a terrible nuisance" (p324); "How silly!" (the £5 fixed stamp duty on charitable trust deeds—p329); "the rule against accumulation should be abolished" (p221). The author says that a single coherent set of rules is needed for inheritance tax and capital gains tax which might be slipped into the UK tax re-write project "in the unlikely event that this ambitious project ever re-writes the IHT and CGT legislation" (p342). Whether we agree or not, we certainly know where Mr Kessler stands.

Mr Kessler draws widely on numerous sources (giving website addresses where appropriate) and treats the parliamentary drafter as inspiration and model. Fair enough. Yet he is wise enough to realise that everyone is fallible. He cites Alexander Pope:

> Whoever thinks a faultless piece to see
> Thinks what ne'er was, nor is, nor ne'er shall be.

Doubtless the odd typographical or other mistake can be found in *Drafting Trusts and Will Trusts* as in any other book ever written. But this book, which ends with some sensible advice on the execution of wills and will trusts, should be in the library of everyone interested in the science and art of drafting legal documents.

Richard Castle
Wellington, New Zealand
schloss@paradise.net.nz

Plain Language for Lawyers

Michèle M Asprey
Published by The Federation Press
Third edition July 2003
Paperback Recommended retail price Aus$49.50

ISBN 1 86287 464 6

I was shocked to realize that the first edition of Michèle Asprey's *Plain Language for Lawyers* was published in 1991. But I was delighted to find that reading the recently published 3rd edition of the book was as fresh, informative and enjoyable as reading the 1st edition.

Plain Language for Lawyers is packed with interesting, practical, and often amusing information, as one would expect from a writer of Asprey's knowledge, experience and humor. The book is an excellent demonstration of the use of plain language—a clear and simple style—while explaining why to use plain language, how to tackle common plain language writing challenges in a variety of contexts, and answering critics. But this book is more than a book; it is also a reference manual to which readers can return time and again for reliable and accurate help.

The expanded 3rd edition is brought up to date seamlessly and with obvious careful attention to detail, including new footnotes and references throughout, and very interesting web links. Wisely, the sound structure of the book is retained. With an expected 35 billion email messages per day in 2005, a chapter on email and the internet is both timely and fascinating reading (do you know how to stick out your tongue by email, say "thank you very much" in a flash, or know about TLAs?). And the very helpful chapter on document design now contains excellent suggestions for document design on computer screens.

Despite the title, this book has a much broader appeal than just to lawyers. Anyone who works in or around the law, in any jurisdiction, should have this book and give a copy to a friend or colleague.

Read and enjoy. I certainly did.

David Elliott
Alberta, Canada
words@davidelliott.ca

Clarity's Annual General Meeting

When?

Saturday 7 February, 2004, 11 am

Where?

Large Conference room
New Square Chambers
12 New Square
Lincoln's Inn
London WC2A 3SW

Telephone

(020) 7419 8000

For full details on how to get here, including a map of Lincoln's Inn, go to the website at : http://www.newsquarechambers.co.uk/maps.htm

(The large Chambers conference room is in an annex just round the corner from the main entrance to Chambers. It is at 17 Old Buildings, which is the green 'blob' immediately to the right (east) of the label "New Square Chambers" on the map at the above link.)

A leading speaker has been invited.

An informal lunch at a nearby restaurant follows the meeting.

If you are visiting from outside the UK, you can be assured of a warm welcome.

Scribes celebrates 50 years

Scribes, the American Society of Writers on Legal Subjects, celebrated its 50th anniversary at a luncheon August 9, 2003, in San Francisco, held in conjunction with the annual meeting of the American Bar Association.

Speakers at the celebratory luncheon included the Honorable John T. Noonan, Judge of the United States Court of Appeals for the Ninth Circuit, and Professor Lawrence M. Friedman, author of *American Law in the 20th Century* (Yale University Press, 2002) and several other books. Scribes President Donald J. Dunn, Dean of the University of LaVerne College of Law, presided. The luncheon was sponsored by West Publishing Company.

The origin of Scribes

In 1951, New Jersey Chief Justice Arthur T. Vanderbilt proposed forming an organization of lawyers and law professors interested in promoting good legal writing. In response, 41 like-minded lawyers convened at the 1953 ABA annual meeting in Boston to create Scribes. Today Scribes' membership exceeds 1,000 published lawyers, judges, law professors, and legal editors who support the goal of promoting and recognizing excellence in legal writing.

In support of its goal, Scribes publishes *The Scribes Journal of Legal Writing* (now edited by Professor Joe Kimble, a Scribes member and President-elect of Clarity) and a quarterly newsletter, *The Scrivener*. It also sponsors three award programs annually:

- The Scribes Book Award, presented at the ABA annual meeting for the best work of legal scholarship (Professor Friedman's book won this year's award).
- The Scribes Law-Review Award, presented at the National Conference of Law Reviews annual meeting for the best student writing in a law review.
- The Scribes Brief-Writing Award, presented at the ABA annual meeting for the best student brief entered in a national moot-court competition.

Officers elected

Also at the 2003 luncheon, Beverly Ray Burlingame was elected President of Scribes, having previously served as President-elect. She is a partner in the law firm of Thompson & Knight in Dallas, Texas. Elected President-elect was Professor Norman Otto Stockmeyer—another member of Clarity—of Thomas M. Cooley Law School in Lansing, Michigan.

Membership

Membership in Scribes is open to any attorney who has published two or more articles on legal subjects, or has published a book on a legal subject, or has edited a legal publication, or has published a decision as a judge or administrative hearing officer. Associate membership is also available.

For further information, visit the Scribes website, www.scribes.org. Or write to the Executive Director, Glen-Peter Ahlers, at Barry University School of Law, 6441 East Colonial Drive, Orlando, Florida 32807-3650.

Clarity news

From the President

Our 50th issue

This is the 50th issue of *Clarity*. From its beginnings as a small pamphlet published for an exclusively UK readership, *Clarity* has grown into the substantial publication you see today. Its unique mix of practice and theory has guaranteed a wide and diverse readership in many countries around the worlds. Its readers come from diverse backgrounds—lawyers, linguists, legislators, judges, academics, public officials, legislative drafters, to name but a few.

We owe a great debt of gratitude to *Clarity*'s editors. In its early years, Mark Adler (England) steered the journal—indeed, steered Clarity as an organization—through its formative stages. In more recent years, Phil Knight (Canada) added an international dimension, bringing to the editorship a depth of experience, learning and insight that few can match. And now a new editor, Michèle Asprey (Australia), took over from July 2003. Michèle is a leading author and practitioner in the area of legal language. She was for many years the precedents manager of Australia's largest law firm. She has also written a successful book—*Plain Language for Lawyers*—which is reviewed on page 43. It is a splendid analysis of plain legal language and is now in its 3rd edition.

Brochure and website

In my previous message, I mentioned a forthcoming Clarity brochure. It has now been printed, and copies have been sent to all of Clarity's country representatives. If you would like copies to distribute at meetings or conferences—or just to hand out to friends and colleagues you think might be interested in joining Clarity—send me an email and I will be delighted to post some brochures to you.

We have also been working on the appearance of our website—www.clarity-international.net—to ensure that it demonstrates best practice in website design and reflects our aims of clarity, brevity and useability. The changes should be up and running within the next few months.

In both of these endeavours, we have benefited from financial and technical help from Mallesons Stephen Jacques, Australia's largest law firm. In particular, Ted Kerr, a senior partner in the firm and a long-standing Clarity member, has given his unstinting support and has been the moving party in garnering the firm's support. Thank you, Ted.

Annual General Meeting

Clarity's Annual General Meeting will be held on Saturday 7 February (2004), 11 am, at Lincoln's Inn, central London. More information will follow. A leading speaker has been invited. Come and meet your fellow Clarity members. An informal lunch at a nearby restaurant follows the meeting. If you are visiting from outside the UK, you can be assured of a warm welcome.

Conference 2005

Many of you will recall our conference in Cambridge (UK) last year, held jointly with the Statute Law Society. It was a great success, with almost 100 participants from 17 countries.

We have been giving some thought to a second conference, to be held in the first week of July 2005. Planning is at a very early stage, but the suggestion is for a four-day conference in France, at Boulogne-sur-Mer—a two-hour train ride from Paris, or an easy ferry ride from Dover. The aim would be to bring together legal practitioners, legislative drafters, teachers of legal drafting, and linguists, on the theme "Clarity and Obscurity in Legal Language." We have approached the Statute Law Society to see if they would like to join us in the conference. More news as it comes to hand. But note that week in your diary now—first week in July 2005.

Format of No 49 and No 50

This issue generally follows the style and format of the previous issue, No 49. Dr Robert Eagleson (Australia) put a lot of effort into planning the style and format. It has provoked some interesting comments from readers, particularly its universal use of numerals in place of words. This issue contains an article by Dr Eagleson explaining some of the reasoning behind the style.

New President

At the end of this year, my three-year term as President of Clarity comes to an end. I have greatly enjoyed the opportunity to help lead Clarity during a period of both growth and consolidation. I would like to thank the committee members and others who have willingly put an enormous amount of effort into ensuring that Clarity continues to expand and develop. Amongst those who deserve special thanks are Clarity's country representatives, its treasurer, and the editors of its journal.

My particular thanks go to Clarity's membership secretary, Professor Joseph Kimble, who is to be our next President. Joe takes up the position of President at the start of 2003.

Joseph Kimble is Professor of Law at Thomas Cooley Law School, in Michigan. He is a prolific author and speaker, with numerous articles and conference speeches to his name. He edits *The Scribes Journal of Legal Writing*, and has for many years edited the "Plain Language" column of the *Michigan Bar Journal*. He is known around the English-speaking world for his leadership in teaching plain language to law students and lawyers, and for his zeal in promoting the benefits of clear writing. Nobody is a stronger and more enthusiastic supporter of Clarity. In his hands, Clarity will go from strength to strength.

Peter Butt
peterb@law.usyd.edu.au

Membership matters

New members

Australia

Adam Bartlett, Partner
Mallesons Stephen Jaques
Canberra

Deborah Battisson, Solicitor
Mallesons Stephen Jaques
Sydney

Cowley Hearne
[Sarah Neal]
North Sydney, New South Wales

Nicholas Creed, Partner
Mallesons Stephen Jaques
Melbourne

Melissa Daly,
Senior Associate
Mallesons Stephen Jaques
Melbourne

Andrew Flannery,
Senior Associate
Mallesons Stephen Jaques
Sydney

Andrew Gormly, Solicitor
Mallesons Stephen Jaques
Melbourne

Maria Granato,
Senior Associate
Mallesons Stephen Jaques
Brisbane

Glenda Hanson,
Senior Associate
Mallesons Stephen Jaques
Sydney

Law and Justice Foundation of NSW
Sydney, New South Wales

Wayne Leach,
Senior Associate
Mallesons Stephen Jaques
Sydney

Rachael Lewis,
Senior Associate
Mallesons Stephen Jaques
Canberra

Di Males, Senior Associate
Mallesons Stephen Jaques
Melbourne

Paul McLachlan,
Senior Associate
Mallesons Stephen Jaques
Brisbane

Amanda Morgan,
Senior Associate
Mallesons Stephen Jaques
Melbourne

Justice Graham Mullane, Judge
Family Court of Australia
Newcastle, New South Wales

Chris Scott, Senior Associate
Mallesons Stephen Jaques
Perth

Christopher Thomas, Solicitor
Transgrid
Sydney, New South Wales

Turtons Lawyer
[Sue Purdy]
Sydney, New South Wales

Belgium

Thierry Claeys, Partner
Claeys & Engels
Brussel-Bruxelles

Canada

Janet Pringle, Writer
Calgary, Alberta

Denmark

John Lawrie, Counsel
Burmeister & Wain
Scandanavian Contractor A/S
Copenhagen East

Germany

STOB gmbh
[Siegfried Breiter]
Stuttgart

Japan

Shinzaburo Kaji, Retired
Ayase-shi, Kanagawa-ken

New Zealand

Maritime Safety Authority of New Zealand
[Tim Workman]
Wellington

M.E. Nixon, Attorney
Inland Revenue Department
Wellington

Spain

Frederico Olucha Torrella, Partner
Olucha Abogados
Castellon

Sweden

Helena Englund, Consultant
Sprakkvalitet
Solna

United States

Robert Balch, Attorney
Robert W. Balch Law Firm
Tucson, Arizona

Mark Cooney, Professor
Thomas M. Cooley Law School
Lansing, Michigan

William Derick,
Office of Chief Counsel
IRS
Chicago, Illinois

Frank Dinovo, City Planner
Champaign County Regional Planning Commission
Urbana, Illinois

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Legal Vice Presidency
The World Bank
Washington,
District of Columbia

Willoughby Sheane, Jr., Attorney
Arlington, Virginia

John Strylowski,
Regulatory Analyst
U.S. Department of Interior
Washington,
District of Columbia

University of Chicago D'Angelo Law Library
Chicago, Illinois

New country representatives

We welcome a representative for Thailand—Frank Anderson, who can be contacted at ethics@loxinfo.co.th. He has served as English editor for a large Bangkok law firm.

We also welcome a representative from Japan—Kyal Hill. He is a legal translator at Mori Hamada & Matsumoto Law Offices.

You will find the contact details for both representatives on page 2.

Appointments and retirements

James Kessler (of London) has been appointed a Queen's Counsel. He is the author of *Drafting Trusts and Will Trusts*, which is reviewed by Richard Castle on page 42 of this issue.

His Honour Judge Michael Cook of the UK has retired from the circuit bench (but not, we think, from the editorship of *Cook on Costs*).

Patrons

One of Clarity's two patrons, Sir Christopher Staughton, was in Australia in April this year for the Commonwealth Legal Convention. Both Sir Christopher and Clarity's other patron, Justice Michael Kirby, delivered papers at the Convention.

While in Australia, Sir Christopher met with a number of Australian Clarity members. During the meeting, Sir Christopher spoke of his views on the interpretation of documents. You will see an article by him in this issue, beginning on page 24.

Law and Justice Foundation website

The Law and Justice Foundation of New South Wales is a supporter of Clarity's aims. The Foundation has now put onto its web site some material published by the (now defunct) Centre for Plain Legal Language. Follow the links for the first five items at http://www.lawfoundation.net.au/information/pll/booklet.html

Old dues

Have you paid your annual dues for 2003?

Details of the current annual subscription rates and methods of payment are set out on page 48. Please send any outstanding dues to your country representative listed on page 2.

Application for membership in Clarity

Individuals complete sections 1 and 3; organisations, 2 and 3

1 Individuals

Title *Given name* *Family name*

Name .....

Firm ..... Position .....

Qualifications

2 Organisations

Name .....

Contact Name

3 Individuals and organisations

Address .....

.....

Phone ..... Fax .....

Email .....

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Other European countries	∈25
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How to join

Complete the application form and send it with your subscription to your country representative listed on page 2. If you are in Europe and there is no representative for your country, send it to the European representative. Otherwise, if there is no representative for your country, send it to the USA representative.

Please make all amounts payable to Clarity. If you are sending your subscription to the USA representative from outside the USA, please send a bank draft payable in US dollars and drawn on a US bank; otherwise we have to pay a conversion charge that is larger than your subscription.

Privacy policy

Your details are kept on a computer. By completing this form, you consent to your details being given to other members or interested non-members but only for purposes connected with Clarity's aims. If you object to either of these policies, please tell your country representative. We do not give or sell your details to organisations for their mailing lists.