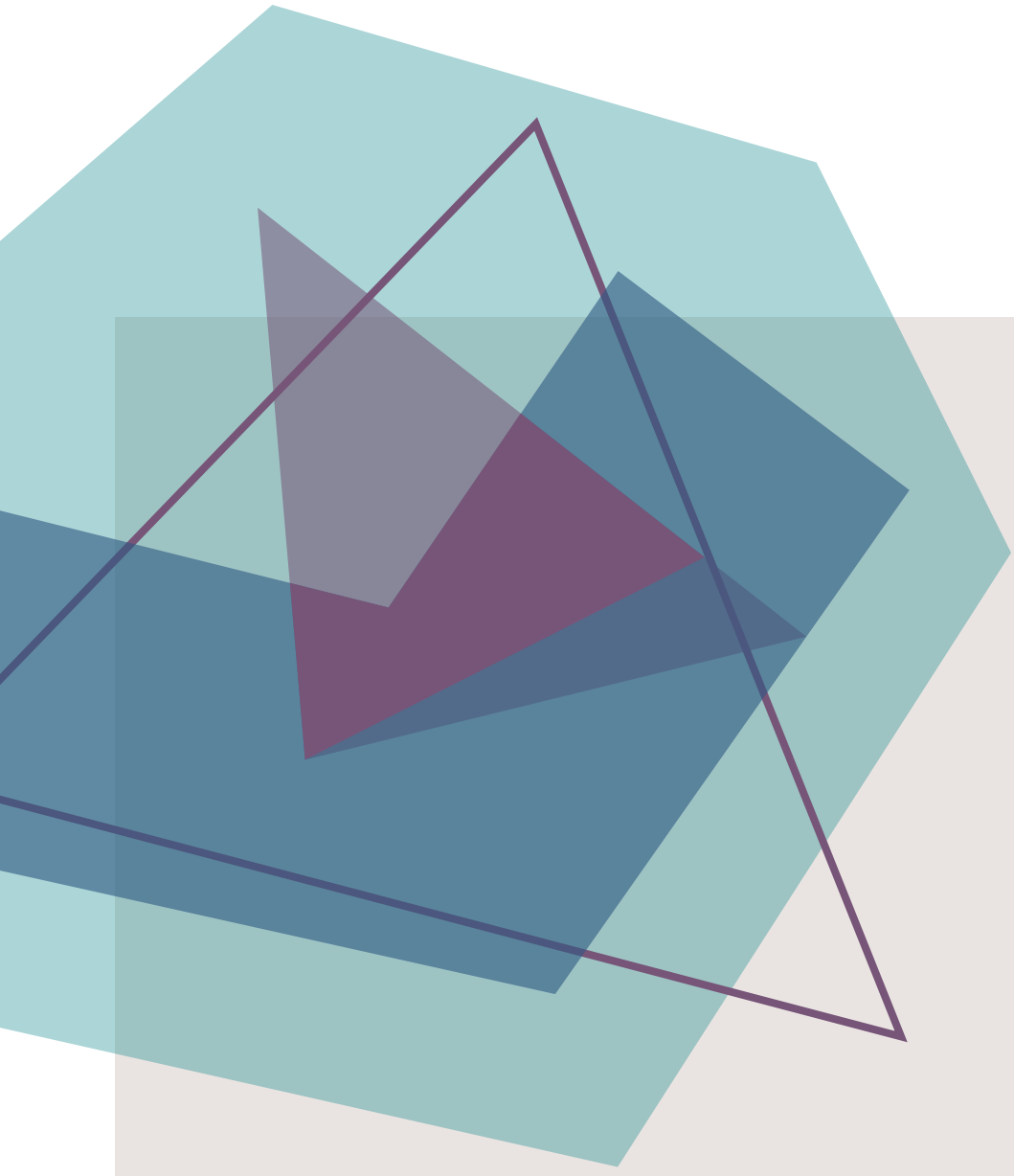
Number 75 2017

The Clarity Journal

Published by Clarity, the international association promoting plain legal language



clarity

From the President

I was delighted to be elected as President of Clarity at the biennial general meeting held in Wellington, New Zealand in November 2016. It is an honor and a privilege and I intend to do my utmost throughout my term to promote and develop Clarity.

Joh Kirby did a fantastic job during her term, particularly overseeing the development of a new Clarity brand and website. Working with the Victoria Law Foundation in Melbourne, Australia, Joh was instrumental in developing a database that enables members to search journal articles by author, title or keywords. I am delighted that she has agreed to join Peter Butt and Annetta Cheek as co-opted members of the Clarity Board.

While we have a healthy membership base, sadly many are non-financial. If you haven't been paying your subscriptions in recent years, please consider doing so. Producing the high quality Clarity journal that Julie Clement does so well as editor is not an inexpensive task. It is a fantastic resource for members. As a member, you also have early access to it before it goes online. And, of course, membership entitles you to discounted registration fees at our conferences. With your continued support as a member we can do more to support you as a plain language practitioner. And every subscription received brings a big smile to the face of our hard working Treasurer Joe Kimble.

Our country representatives are the key link to Clarity in your country. There is a full list of them in this journal. Please contact the representative in your country and offer them comments or indeed suggestions as to local activities that could be organized to enable members to share ideas and spread the word.

Do also feel free to contact me at any time with suggestions, comments or queries or just to say hello. I am keen to work closely with all members to grow and develop Clarity as the international association promoting plain legal language. There are various initiatives we are planning this term but new ideas are always welcome.

We hope to be able to announce details of Clarity 2018 soon. When announced, do seriously think about attending. You won't regret it.

Eamonn Moran

President
claritypresident@gmail.com

Editor's note

A recent study showed that only .22% of software consumers accessed the "fine print" terms of their end user licensing agreements, and those who did spent too little time to absorb even a fraction of the text. This isn't surprising. People don't read fine print. And, why would we? It's small, it's dense, it's poorly written, and it's typically filled with jargon and legalese. For all of these reasons – and more – it is simply easier to ignore it.

Even plain language advocates and consultants ignore the fine print! How many of us strive for clarity in our work with clients yet fall back on dense, "protective" legalese in our own agreements and contracts? (I am personally guilty as charged.)

And fine print is not just in contracts. It's everywhere! It is in loan offers, credit card statements, privacy notices, advertisements, warranties, bank statements, and coupons. Chances are, you'll read a document with fine print today; chances are, you'll ignore it.

It is precisely because of our natural tendency to ignore the fine print that we must work even harder to pay attention and to help our clients do so as well. Fine print is critical because it is the place where terms and conditions – especially those that may be unfavorable to consumers – are disclosed. Fine print is also the dark corner where deception can hide behind legal-sounding words and complex sentence structures.

Shining a light on this dark corner of fine print are several incredible professionals who have agreed to share their insights in this issue, which is the brainchild of the Center for Plain Language.

Penelope Hughes and Maya Frazier look at the HIPAA privacy notice – a critical notice that everyone in the U.S. receives, yet few read. Their article describes how the Department of Health and Human Services used plain language to rewrite and redesign this, one of the most common "fine print" documents around.

Kristi Wolff and Donnelly McDowell tackle what it really means to disclose terms in "clear and conspicuous" ways, as the U.S. Federal Trade Commission demands of advertising and endorsements. They remind us that creating "clear and conspicuous" disclosures is not nearly as clear as it sounds!

Lena Groeger provides a timely and incisive look at U.S. election ballots – particularly how poor information design hides and obscures choices. The issues around ballot design are not unique to the U.S., but after the 2000 election's legal challenges, they are perhaps the most well publicized.

All these articles show the scope of the problems we face with fine print in a variety of legally binding documents. Lynda Harris's article points to the solutions. She provides practical, step-by-step advice on how to transform dense legalese into clear, usable text.

Susan Kleimann and I then demonstrate how plain language can be built into projects – from planning to writing to testing. Using the development of the U.S. loan estimate and closing disclosure, we look at how plain language techniques can bring important terms and conditions out of hiding and into plain sight.

Finally, Rich Horn examines UDAAP or unfair, deceptive, or abusive acts of practices under the Dodd-Frank Wall Street Reform and Consumer Protection Act. He argues that the only way for organizations to truly protect themselves against UDAAP claims is to test their disclosures rigorously with consumers.

Whether in reading it ourselves or trying to rewrite it for others, all of us have stumbled over the fine print at one point or another. This issue acknowledges and describes the scope of the problem but also provides practical examples and solutions for addressing it. I hope that you enjoy reading how different organizations have dealt with "the problem of fine print" and that the issue provides tools, techniques, and models that better allow you to tackle the fine print in your own work.

Barbra Kingsley, Ph.D.
bkingsley@kleimann.com

In this issue

Notice me – communicating patient privacy rights through effective notices

Penelope Hughes and Maya Frazier

Penelope Hughes, JD, MPH has over ten years of experience working with innovative technologies and health-related nonprofits. Currently, Penelope provides policy analysis and program support as a contractor for the Office of the Chief Privacy Officer within the Office of the National Coordinator for Health Information Technology at the U.S. Department of Health and Human Services, focusing on health information technology and related privacy and security issues, including mobile health and consumer privacy issues. Penelope has conducted research and co-authored papers related to consumer attitudes and preferences regarding the privacy and security of health information and health information technology.

Maya L. Frazier, JD, has in-depth health law policy and research experience with health information technology and health privacy. Currently,

Privacy plays a vital role in society, and the concept of health information privacy has persisted for a particularly long time, with providers' obligation to protect the privacy of their patients dating back to the Oath of Hippocrates.[1] Even in today's world, as individuals engage and share more and more information online, they still value and hold dear Brandeis' "right to be let alone." [2] Information sharing and data collection has increased across a myriad of industries, and in the area of health care, the adoption of electronic health records has significantly expanded the sharing and storage of individuals' health information online.[3] However, along with this growth in online engagement comes an increased likelihood that individuals' information will be collected and shared in ways they may not anticipate. In such an environment, privacy notices take on a critical role, especially when sensitive information, such as health records, are at issue.

The Obama Administration's 2012 Consumer Privacy Bill of Rights[4] identified 'transparency' as a pivotal privacy right of individuals in the modern digital economy. Specifically, the Administration notes "consumers have a right to easily understandable and accessible information about privacy and security practices."[5] The globally recognized Fair Information Practice Principles (FIPPs)[6] , developed in the 1970's and the foundation of many international privacy frameworks, also include notice and disclosure of information practices as a key principal. Similarly, the FTC's "fair information practice codes" include notice as one of five core principles of privacy protection – "the most fundamental principle is notice."[7] The report continued, "without notice, a consumer cannot make an informed decision as to whether and to what extent to disclose personal information."[8] Additionally, there are a number of academic studies documenting the need for easily understandable privacy notices.[9]

Privacy notices can be difficult to design and implement effectively. In the case of privacy notices related to health information, there are specific content requirements that must be included in notices posted by health care providers and others subject to the Health Insurance Portability and Accountability Act (HIPAA).[10] However, complex technical privacy notices often have the unintended consequence of leaving individuals in the dark about the very practices they are meant to communicate. Rather than reading the content, individuals often blindly sign, hit 'accept', or outright skip privacy notices.[11] Particularly in the health care space, where the information involved is sensitive, individuals need easier to understand notices to correctly ascertain how their information is being used, secured and shared. Clearer notices can also aid individuals in exercising their statutory rights to access their own health information[12] and become more engaged in their health care, thus improving their health outcomes. A recent Office of the National Coordinator for Health Information (ONC) blog stated that "individuals with access to their health information are better able to monitor chronic conditions, adhere to treatment plans, find and fix errors, and directly contribute their [health] information to research."[13] Given the necessity for understandable and user-friendly privacy notices, ONC along with the Office for Civil Rights (OCR), which enforces HIPAA, launched a model Notice of Privacy

Practices (NPP) project to develop model privacy notice content to be used by health care providers and other HIPAA covered entities nationwide. This article will explore the process of developing the model Notices of Privacy Practices (Model NPPs), the goals of the project, its key components, and results.

"complex technical privacy notices often have the unintended consequence of leaving individuals in the dark about the very practices they are meant to communicate"

Background

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) provides individuals with a variety of rights and protections in regard to their health information. In particular, the Privacy Rule provides individuals with rights over their health information, such as the right to access a copy of their health records, and outlines how their health information may be utilized and disclosed.[14] Under HIPAA, covered entities (CEs) – health plans, health care clearinghouse, and certain health care providers – are required to provide a notice of privacy practices (NPPs) explaining this information to individuals.

NPPs outline individual rights with respect to protected health information (PHI), how CEs use and disclose PHI, CEs legal responsibility in regard to PHI, and contact information for individuals looking for more detailed information about a CEs privacy policy. However, given the complex nature of NPPs, individuals may misunderstand their health information rights or opt to not read the notices at all. Privacy notices, across all industries, tend to be long, complex, and overloaded with legalese,[15] and consequently are often ignored.[16] Research shows that privacy notices are "more difficult to understand than the average issue of the *New York Times*"[17] and even people with advanced, professional degrees struggle to grasp their contents.[18] This is particularly concerning in the case of NPPs, which communicate important information about individuals' health data and health rights.

Goal of project

ONC and OCR recognized that model NPP language based on the requirements of HIPAA could be helpful in presenting this very important information in a way that would be easier for individuals to understand and act upon. While CEs have considerable discretion in how they present the information required in an NPP, the content is fairly sophisticated and technical, and could create challenges for the average person to understand. For example, the NPP must describe and include examples of permitted uses and disclosures of PHI for treatment, payment and operations purposes; describe other purposes for which the covered entity is permitted or required to disclose PHI; and, describe an individual's rights with respect to PHI. ONC and OCR thus focused on taking the language and content required by the HIPAA Privacy Rule and creating a customizable template with simplified but accurate language that could be used by CEs to produce an easy to understand notice that would still satisfy the HIPAA requirements.

When creating the model NPP language, two goals were particularly important: creating understandable content and enabling readers of the notice to have the knowledge necessary to take appropriate action relative to their health care information. As described earlier, research has found that notices of privacy practices are often not read by individuals, and even when they are read, they are poorly understood. Preliminary consumer testing of privacy notices of health care providers conducted as part of the project similarly indicated that consumers often don't bother reading the notice and misunderstand the content. For example,

Maya serves as a privacy policy program analyst for the Office of the Chief Privacy Officer within the Office of the National Coordinator for Health Information Technology at the U.S. Department of Health and Human Services. Maya provides analyses on privacy policies and regulation related to health information technology and produces various educational resources for stakeholders, namely small-mid-size physician providers. Maya has also collaborated with various ONC offices to produce the forthcoming Model Privacy Notice.

NOTES

1 Rothstein, Mark, The Hippocratic Bargain and Health Information Technology. Journal of Law, Medicine & Ethics, 2010

2 Timeline: A History of Privacy in America https://www.scientificamerican.com/article/timeline-a-history-of-privacy/; Madden, Mary and Rainie, Lee. Americans' Attitudes About Privacy, Security and Surveillance, http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/, 2015; see also Raine, Lee and Duggan, Maeve, 3. Scenario: Health information, convenience and security http://www.pewinternet.org/2016/01/14/scenario-health-information-convenience-and-security/, 2016; Martin, Kristen, Privacy Notices as Tabula Rasa: An Empirical Investigation into How Complying with a Privacy Notice Is Related to Meeting Privacy Expectations Online, Journal of Public Policy & Marketing, 2015; Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global

some participants in the consumer testing group believed that the NPP was a form telling them that their information is kept private, when in reality it describes how information is used and shared. Therefore, when developing the model language for the NPP, one important goal was to create an NPP that consumers would be more likely to read and understand.

A second goal was to create an actionable notice. Beyond simply comprehending the language of the notice, it is important for individuals to also understand their health information rights and how to act on those rights – for example, by requesting a copy of their health information. As such, the project sought to create model NPP language that would be easy for individuals to digest and act on after reading the notice. Preliminary consumer testing conducted for the project found that individuals respond positively to the concept of health information rights and want to learn more about that topic. Testing also found that when individuals understand that they have these rights, they are more motivated to take action. To make the language more actionable, the NPP project focused on identifying issues around health information rights that may be difficult or hard for patients to understand, and then clarifying and simplifying that language.

Strategy

Developing model NPP language that presents complex, regulatory-required language in a way that is easy for individuals to understand and act on is an ambitious goal, and it required a thoughtful strategy with significant amounts of user-testing and iterative design. ONC contracted with Kleimann Communication Group to conduct these activities and develop the model notice. The project had multiple phases, including context setting, identifying ways to best present this information to individuals, and conducting multiple rounds of cognitive testing with iterative refinement of the design. These major phases, and related key findings, are described in more detail below.

When setting the context, the contractor first conducted a thorough literature review. The literature review identified important recurring themes, including that NPPs are often too long and complex, individuals do not understand them, and because they often have no clear narrative flow, individuals are not inclined to act on them. Additionally, the contractor conducted initial focus groups that confirmed and echoed these findings. For example, participants in the initial focus groups indicated that they do not generally read NPPs, and that they misunderstand them, often believing the NPP states that their information will be kept private. A key finding during this phase was the strong interest participants have in their health information rights, and in particular the right to inspect and request a copy of their health information. Participants felt this information was the most important aspect of the NPP. Upon learning about their health information rights, participants indicted they were motivated to take action.

"Developing model NPP language that presents complex, regulatory-required language in a way that is easy for individuals to understand and act on is an ambitious goal, and it required a thoughtful strategy with significant amounts of user-testing and iterative design."

During the formative design phase, the contractor explored the best ways to present NPP information to individuals, focusing on the key messages and content that needed to be emphasized. This included focusing on how to present information

Digital Economy https://www.whitehouse.gov/sites/default/files/privacy-final.pdf

3 ONC Data Brief, https://www.healthit.gov/sites/default/files/oncdatabrief-physician-ehr-adoption-motivators-2014.pdf, 2014

4 Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy https://www.whitehouse.gov/sites/default/files/privacy-final.pdf, 2012

5 Id.

6 Privacy Online: Fair Information Practices in the Electronic Marketplace: A Federal Trade Commission Report to Congress https://www.ftc.gov/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission

7 Federal Trade Commission. Privacy Online: A Report to Congress,1998 https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf

8 Id.

9 Martin, Kristen. Privacy Notices as Tabula Rasa: An Empirical Investigation into How Complying with a Privacy Notice Is Related to Meeting Privacy Expectations Online, Journal of Public Policy & Marketing, 2015

10 See 45 CFR §164.520

11 Martin, Kristen. Privacy Notices as Tabula Rasa: An Empirical Investigation into How Complying with a Privacy Notice Is Related to Meeting Privacy Expectations Online, Journal of Public Policy & Marketing, 2015; Liu, Fei et al., A step towards usable privacy policy: Automatic alignment

about HIPAA and health information rights in a way that would inspire individuals to take action. As part of this phase, the contractor held multiple design meetings and developed a variety of prototypes for testing.

And finally, during the cognitive testing and iterative design phase, the contractor developed and refined the final product. Cognitive testing was quite extensive, including a pre-testing round and four additional rounds of focus group testing in different areas of the country, with an average of seven participants per focus group. After each round of testing, data and input from the focus group was analyzed to identify important insights and patterns related to how participants were understanding the notice content and how likely they were to act upon it. The results of each round of testing were used to refine and improve the design of the NPP until reaching the final iteration.

Project Results

The final model NPP content and design achieved the major goals of being both understandable and actionable. The model language was well-received by stakeholders and successfully balanced providing accurate information based on the HIPAA regulation requirements while using content more easily understandable to the average person. For example, the required content was broken down into simple organizational buckets entitled "Your Information", "Your Rights," and "Our Responsibilities," and the language within each section was simplified based on multiple rounds of consumer testing. Also, the model language and design was made more action oriented by listing "Rights" in the order of importance to individuals and phrasing them as actionable steps that individuals could take. The first item listed under "Rights" on the notice states "You can ask to see or get an electronic or paper copy of your medical record and other health information we have about you. Ask us how to do this." By making this content and design choice, it is easier for individuals to understand their right to get a copy of their health information and take the appropriate steps.

As further evidence of the success of the project, the target audience for the model NPPs, health plans and health care providers, responded well to the design. Reviews of the NPPs found them easy to read and useful, as well as a helpful baseline and convenient way for CEs to comply with the HIPAA requirements.[19] The model NPPs have been continually accessed and downloaded since their release, and since being posted they have been downloaded over 200,000 times.

It is clear that multiple rounds of focus group testing with appropriate audiences and the incorporation of an iterative design process were critical components in this project and key to creating a successful final product. Also important was the involvement of OCR, the federal agency with regulatory and enforcement authority regarding HIPAA and its notice of privacy practices requirement. Combined, this careful attention to the language and design of NPPs achieved the goal of engaging the consumer and presenting useful, usable notice content about health information practices and important rights while fully complying with regulatory requirements. Hopefully the availability of this resource will result in more individuals understanding and acting on the rights they have with respect to their health information, in particular by requesting a copy of their own health information and becoming more engaged in their health care.

of privacy statements, Carnegie Mellon University Research @CMU, 2014; Balebako, Rebecca, et al., The impact of timing on the salience of smartphone app privacy notices, Proceedings of the 5th Annual ACM CCS Workshop on Security and Privacy in Smartphones and Mobile Devices, 2015

12 45 CFR §164.524 Access of individuals to protected health information.

13 DeSalvo, Karen, and Samuel, Jocelyn. Empowering Patients: New Videos to Promote Access to Electronic Health Information, https://www.healthit.gov/buzz-blog/consumer/empowering-patients-videos-promote-access-electronic-health-information/, (2016)

14 See 45 CFR §164.520

15 McDonald, Aleecia and Cranor, Lorrie. The cost of reading privacy policies, I/S: A Journal of Law and Policy for the Information Society, 2008

16 Martin, Kristen. Privacy Notices as Tabula Rasa: An Empirical Investigation into How Complying with a Privacy Notice Is Related to Meeting Privacy Expectations Online, Journal of Public Policy & Marketing, 2015

17 Id.

18 Id.

19 Gold, Kimberly. OCR Publishes Model Notice of Privacy Practices, Health Law and Policy Matters, 2013; see also Adam Greene, HHS Issues Model Privacy Notices, Davis Wright Tremaine LLP Privacy and Security Law Blog, 2013.

Moving beyond "Clear and Conspicuous" – the omnipresent but elusive standard for disclosures under U.S. consumer protection laws

By Kristi Wolff and Donnelly McDowell

Kristi Wolff is a partner in the firm's Washington, D.C. office. Ms. Wolff's practice focuses on food, drugs, dietary supplements, medical devices, personal care and consumer health products, as well as wearable technology and health privacy issues. She has extensive experience advising clients whose products are within the overlapping jurisdictions of the Food and Drug Administration and the Federal Trade Commission. Ms. Wolff handles matters across the full product lifecycle, including concept analysis, claim substantiation, label review, quality and recall scenarios, and contested matters involving the FTC, FDA, National Advertising Division, state attorneys general, and class action litigation. Having served as in-house counsel in the healthcare and food products industries, Ms. Wolff is particularly attuned to balancing business objectives with legal considerations. Her skill in the consumer protection area

Technology is blurring the lines between advertising and informational content. Whether it is lifestyle bloggers touting the latest fitness tracking necklace, pop singers thanking airlines for a great trip, a celebrity extolling the virtues of a morning sickness pill, or a child opening toys on a YouTube video, consumers' social media feeds are a constant scroll of promotion – much of it in the form of shared posts, re-tweets, and pins – that on its face, does not look like traditional advertising.

Case in point: Duchesnay USA was hardly on the tip of consumer tongues until August 2015, when Kim Kardashian tweeted her praise for their morning sickness drug, Diclegis. The Food and Drug Administration issued a warning letter because the tweet failed to conform to the "fair balance" disclosure requirements of the Prescription Drug Marketing Act. There can be little doubt, however, that the Kardiashian tweet was considered highly successful from a public relations perspective as word of the product and its high-profile user filled the online, cable, and even legal news cycle for a few days afterward.[1]

Native advertising – or advertising that doesn't look like advertising – is only part of the issue. With consumers increasingly viewing content on mobile devices, adequately conveying privacy practices, material terms of a product promotion or free shipping offer, or more complex disclosures relating to a financial transaction present obvious logistical hurdles. As consumers seek and provide information in new ways, regulators have become concerned. Adequate disclosures are addressed in a multitude of federal laws and regulations and yet, as marketing methods change and consumers view and share information in new ways, the Federal Trade Commission has made ensuring adequate disclosures a priority across a variety of industries. The agency has issued guidance, pursued enforcement, and expressed concern in speeches and Congressional testimony that consumers remain inadequately informed about material aspects of the content they see. This article explores the various ways that consumer protection law seeks to ensure adequate disclosures in consumer-directed marketing and the challenges of applying long-standing legal principles to changing consumer behavior.

Disclosure Requirements Are Ubiquitous in Consumer Protection Law

Every consumer-facing company regularly grapples with legal issues related to disclosures. Moreover, nearly every federal U.S. consumer protection law addresses disclosures in some respect. Some laws take a fairly prescriptive approach, such as the Truth in Lending Act (TILA) and Regulation Z, which require specified disclosures in connection with offering credit to consumers, or the Gramm-Leach-Bliley Act

and Regulation P, which provide a model privacy form as a recommended but non-compulsory way to comply with consumer financial privacy notice requirements.

In other cases, the onus is on the advertiser to figure out what needs to be disclosed and how it should be disclosed. Under the Federal Trade Commission (FTC) Act, the FTC is empowered to prevent unfair or deceptive acts or practices.[2] Similarly, the Consumer Financial Protection Bureau (CFPB) is empowered to prevent unfair, deceptive, or abusive acts or practices in connection with any consumer financial product or service under the Dodd-Frank Act.[3] The FTC has long recognized that disclosures are central to the analysis of what constitutes a deceptive act or practice, and the CFPB has followed suit. The FTC's 1983 Policy Statement on Deception makes clear that "written disclosures or fine print may be insufficient to correct a misleading representation" and cites to the Commission's 1970 Statement of Enforcement Policy regarding "clear and conspicuous disclosures."[4]

But saying that disclosures need to be "clear and conspicuous" only begs the question of what it means to be "clear and conspicuous." The FTC has attempted to shed further light on how it evaluates disclosures through a series of guidance documents. The FTC's Endorsement Guides, initially published in 1980 and subsequently updated in 2009, make clear that material connections – such as an employer-employee relationship, monetary compensation, or providing free product – between an endorser and seller that are not reasonably expected by the audience must be clearly and conspicuously disclosed.[5] While the Endorsement Guides themselves don't address how the disclosure should appear, subsequent guidance advises that disclosures should be "close to the claims in which they relate," "in a font that is easy to read," and "in a shade that stands out against the background."[6]

Of course, stating those principles is much easier than applying them in practice. The FTC's .Com Disclosure Guides, initially released in 2000 and updated in 2013, provides further guidance on how to apply these principles to online advertising in practice. In addition to discussing what are known as "the Four P's" of disclosure analysis – prominence, presentation, placement, and proximity – the .Com Disclosure Guides emphasize that "for disclosures to be effective, consumers must be able to understand them." This means that "advertisers should use clear language and syntax and avoid legalese or technical jargon." This also means that sometimes more is less, since extraneous disclosures reduce the likelihood that a consumer will read and understand the key message.

Still, modern technology makes these seemingly straightforward standards around clarity difficult to apply. Enter again, the Kardashians. In addition to tweeting about morning sickness relief, the Kardashian family has reportedly promoted products in social media on at least 100 occasions, allegedly without disclosing that they have received compensation as endorsers. Truth in Advertising (TINA), a Connecticut-based advertising watchdog, raised concerns in August 2016 that the Kardashians were engaging in deceptive advertising by failing to disclose their material connection to these products.[7] TINA even went so far as to file a complaint with the FTC explaining its investigation and urging the agency to take action.[8] On its face, TINA's analysis may appear to be correct that the Kardashians do not make an overt disclosure of material connection on the posts that TINA features in its complaint. This isn't the end of the analysis, however. The real question is whether consumers would expect that the Kardashians were compensated for posting the content. If they would, no disclosure is required. Or, put another way, if consumers were "keeping up" with the Kardashians – or have any familiarity with them – would it be reasonable to think that they engaged in this conduct without being compensated?

was recently recognized as she was named a 2015 Washington, DC, *Rising Star by Super Lawyers* magazine

Donnelly McDowell is an associate in the Washington, D.C. office of Kelley Drye & Warren LLP. Mr. McDowell's practice focuses on advertising and marketing, food and drug law, consumer financial protection matters, and network marketing compliance. Mr. McDowell advises clients on compliance with relevant federal and state laws in these areas and assists in the development of risk minimization strategies to avoid litigation and regulatory action.

Mr. McDowell has experience representing clients in a variety of regulatory and litigation matters, including class action defense, investigations initiated by the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB), and state Attorneys General.

NOTES

1 http://www.adweek.com/news/technology/fda-rebukes-kim-kardashian-morning-sickness-drug-ad-instagram-166348

2 15 U.S.C. § 45.

3 12 U.S.C. § 5531.

4 FTC Policy Statement on Deception, 1983, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174, 1984

5 12 C.F.R. § 255.5.

6 The FTC's Endorsement Guides: What People Are Asking, 2015, available at: https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking

7 https://www.truthinadvertising.org/exposure-without-disclosure-cashing-kardashians/

8 https://www.truthinadvertising.org/exposure-without-disclosure-cashing-kardashians/

9 Complaint, In re Warner Bros. Home Entertainment Inc., FTC Matter No. 152 3034, 2016

10 The FTC's Endorsement Guides: What People Are Asking, https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking, 2015

11 16 C.F.R. Part 425

12 15 U.S.C. § 8403

FTC Actively Enforcing Disclosure Standards Across Industries

The FTC has also sought to send advertisers a message that it means business and that it's not afraid to take action when advertisers fail to comply with relevant rules and guidance on disclosures. In September 2014, the Commission sent warning letters to more than 60 national advertisers, including 20 of the 100 largest advertisers in the country, advising them that their disclosures in national television and print advertisements were inadequate. Dubbed "Operation Full Disclosure," the warning letters focused on "disclosures that were in fine print or were otherwise easy to miss or hard to read, yet contained important information needed to avoid misleading consumers."

While the warning letters were private and did not result in actual enforcement actions, the FTC has initiated a multitude of enforcement actions that allege a failure to adequately disclose material information. Recent priority enforcement areas in connection with disclosures include:

- Endorsements and testimonials. The Commission has brought a number of enforcement actions against advertisers for failing to properly disclose an endorser's material connection to the product or service endorsed. For instance, the FTC brought a complaint against Warner Bros. Home Entertainment, Inc. alleging that it failed to adequately disclose that it paid online "influencers" to post positive reviews of its video game, *Middle Earth: Shadow of Mordor*. Notably, the complaint notes that Warner Bros. did require a written disclosure that the videos had been sponsored "in the description box appearing below the YouTube videos," but "did not require that the YouTube influencers be instructed to place a sponsorship disclosure clearly and conspicuously in the video itself," "above the fold in the description box," or "visible without consumers having to scroll down or click on a link."[9] As a result, consumers had to click on a "Show More" button to learn of the material connection and most consumers were unlikely to do so. In March 2016, the Commission brought an action against the department store, Lord & Taylor, for an allegedly deceptive social media campaign promoting its Design Lab collection, a private-label clothing line targeted to women between 18 and 35 years old. According to the complaint, the campaign included a series of branded blog posts, photos, video uploads, and online endorsements by specially selected "fashion influencers" that failed to disclose that the influencers were compensated for their promotions. Advertisers promoting products or services through similar campaigns should be mindful of these cases, and the Commission's Endorsement & Testimonial Guides and responses to frequently asked questions in connection with Endorsements, "The FTC's Endorsement Guides: What People Are Asking."[10]
- Negative option offers and ROSCA violations. Recent enforcement trends also make clear that disclosure of material terms for negative option offers is also a priority for the Commission. A "negative option" is a type of sale whereby the seller interprets a consumer's silence, or failure to take an affirmative action, as acceptance of an offer. The FTC's Negative Option Rule regulates a particular type of negative option offer whereby consumers receive periodic announcements of upcoming merchandise shipments and have a set period to decline the shipment or otherwise accept (and pay for) the shipment.[11] Relatedly, the Restore Online Shoppers' Confidence Act (ROSCA) requires that offerers of online negative option offers: (1) clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information; (2) obtain the consumer's express informed consent before charging the consumer's account; and (3) provide simple mechanisms for a consumer to stop recurring charges.[12] The FTC has recently brought a number of enforcement actions for ROSCA violations. For example, in an action against a manufacturer of nutrition supplements and beauty products, the Commission alleged that respondent Nutraclick, LLC deceptively

marketed its membership programs without adequately disclosing recurring monthly fees as required under ROSCA.[13] While Nutraclick did include a disclosure on the Payments Page, the FTC asserted that it was inadequate because "the terms and conditions paragraph is in small print and away from the credit card field" and "consumers' eyes are not drawn to the dense type."[14]

- Privacy-related concerns. The FTC has also cited inadequate disclosures in a number of recent privacy actions. For example, the FTC alleged that Practice Fusion engaged in deceptive acts and practices by soliciting responses from consumers on a healthcare provider satisfaction survey without adequately disclosing that such responses may be published on its public healthcare provider review website.[15] The complaint notes that consumers were required to agree to terms of the "Patient Authorization," which included an authorization to publish the review, but that the consumers were not required to actually view the authorization. In another high profile privacy case, the FTC alleged that Oracle failed to adequately disclose that installing updates to its Java Platform did not uninstall previous versions of the Java software that could still pose security issues.[16] Notably, the FTC acknowledged that Oracle did disclose that "old and unsupported versions of Java on your system present a serious security risk," but alleged that those disclosures fell short both because: (1) it did not inform consumers that the update process did not automatically remove the older versions; and (2) because the webpage with the disclosure was not linked during the update process. The FTC has also noted deficiencies in how health and fitness mobile apps collect consumer data without adequately disclosing such practices to consumers. In one such report, it was found that 39% of free apps and 30% of paid apps sent data to someone not disclosed by the developer either in-app or an the app's privacy policy.[17]

If the multitude of disclosure-related enforcement actions weren't enough, the Commission further reiterated the importance it places on disclosures in a recent public workshop, "Putting Disclosures to the Test." The full day workshop was "aimed at encouraging and improving the valuation and testing of disclosures by industry, academics, and the FTC" and sought to "explore how to test the effectiveness of these disclosures to ensure consumers notice them, understand them and can use them in their decision-making."[18]

In her opening remarks, FTC Chairwoman Edith Ramirez asserted that effective disclosures should: (1) be seen or heard by consumers; (2) be understood by consumers; and (3) facilitate informed decision-making by consumers. Throughout the workshop, panelists explored different mechanisms to test the effectiveness of each of these objectives. Consensus emerged that there was no single "right" way to test a disclosure; test methodology should be carefully designed based on

"effective disclosures should: (1) be seen or heard by consumers; (2) be understood by consumers; and (3) facilitate informed decision-making by consumers."

the primary objective of the study and practical limits such as time and cost. For example, eye-tracking studies can offer valuable objective information about what consumers pay attention to when approaching disclosures, although they are less effective at measuring comprehension. An online comprehension study may be cheaper than a field comprehension study but it doesn't offer the same capacity to replicate what consumers will actually experience in the marketplace.

When an advertiser seeks to test the full range of disclosure objectives (e.g., attention, comprehension, effect on decision-making), it may be necessary to employ multiple methodologies or conduct more than one study. Of course, testing

13 See, e.g., Complaint, FTC v. NutraClick, LLC, No. 16-cv-06819 (Sept. 12, 2016)

14 Id. ¶ 21

15 Complaint, In re Practice Fusion, Inc., FTC Matter No. 142-309 (Aug. 16, 2016)

16 Complaint, In re Oracle Corp., FTC Matter No. 132-3115 (Mar. 29, 2016)

17 FTC, Spring Privacy Series: Consumer Generated and Controlled Health Data, https://www.ftc.gov/system/files/documents/public_events/195411/consumer-health-dataweb-cast-slides.pdf, 2014

18 FTC, Putting Disclosures to the Test, https://www.ftc.gov/news-events/events-calendar/2016/09/putting-disclosures-test, 2016

disclosures can be expensive; it's simply impractical to expect every advertiser to test every disclosure it uses to ensure effectiveness across the board.

So what *must* advertisers do to ensure that their disclosures are sufficiently effective to avoid a deception charge from the FTC or another federal or state regulator? Unfortunately, as is often the case, there's no simple answer. While Chairwoman Ramirez and other regulators speaking at the workshop stopped short of asserting that testing was legally required, it was suggested that a disclosure could be ineffective, and thus result in deception, even if it met the FTC's "clear and conspicuous" standard. This presents a difficult conundrum for advertisers seeking to make effective disclosures in good faith but lacking the flexibility or budget to test the disclosures.

The Clear and Conspicuous Disclosure Conundrum is Here to Stay

It remains to be seen whether the Commission's workshop on disclosure testing was a precursor to a broader initiative on disclosure testing. In some cases, the FTC has released guidance documents or written reports following a workshop and it's possible that such an action in connection with disclosure testing is still forthcoming.

Either way, it's clear that disclosures are going to continue to play a central role in consumer protection law – whether in regard to the Commission's general enforcement under the FTC Act or under another statute with more prescriptive disclosure requirements. Indeed, all three current Commissioners and Bureau of Consumer Protection Director Jessica Rich have repeatedly cautioned in public statements that disclosures will continue to be a priority of Commission enforcement. In a recent speech to the National Advertising Division, for example, Bureau Director Rich identified "three breakout themes" that all centrally relate to disclosures: health apps, health claims that target aging consumers, and advertising in new media. On the privacy front, Rich also explained that entities must continue to research new ways to provide information and choices to consumers in connection with privacy and data security practices.

Particularly as advertisers continue to think of new ways to promote their products and consumers interact with advertising content in new platforms, advertisers should actively and deliberately consider whether they are effectively conveying material information to consumers. Whether it's price information in a negative option plan or how an entity collects and uses a consumer's personal information, we can expect the FTC to continue to bring enforcement actions against companies that fall short of the clear and conspicuous standard or otherwise fail to provide necessary information to consumers.

Disenfranchised by bad design

There is in fact a widespread problem with ballots in the United States: they're often horribly designed.

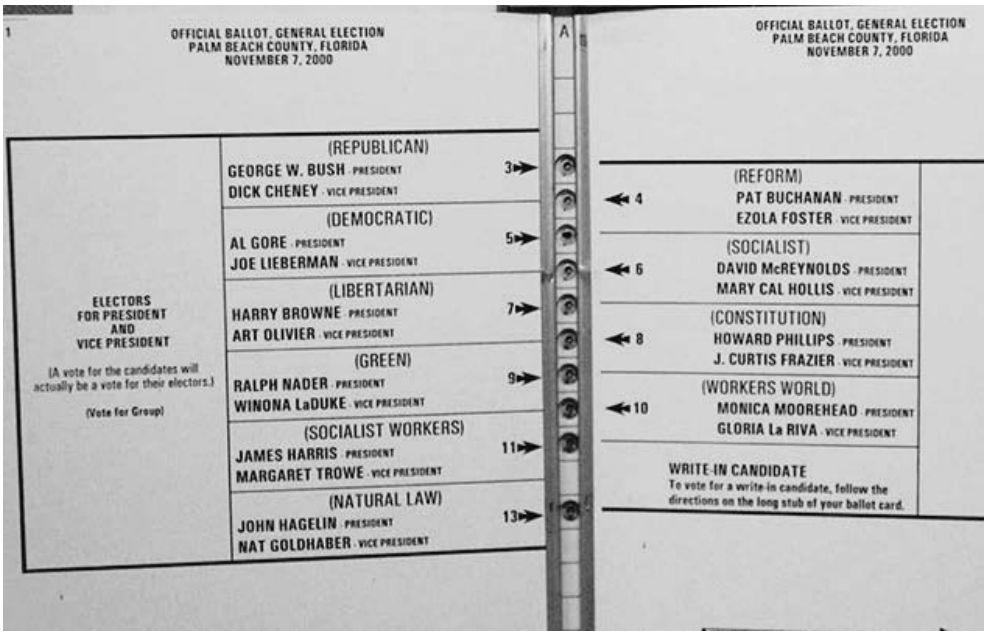
By Lena Groeger

Lena Groeger is a journalist/developer/designer at ProPublica, where she makes interactive graphics and other data-driven projects. She also teaches design and data visualization at The New School and CUNY. Before joining ProPublica in 2011, Groeger covered health and science at Scientific American and Wired magazine. She is particularly excited about the intersection of cognitive science and design, as well as creating graphics and news apps in the public interest.

This Nov. 8, even if you manage to be registered in time and have the right identification, there is something else that could stop you from exercising your right to vote.

The ballot. Specifically, the ballot's design.

Bad ballot design gained national attention almost 16 years ago when Americans became unwilling experts in butterflies and chads. The now-infamous Palm Beach County butterfly ballot, which interlaced candidate names along a central column of punch holes, was so confusing that many voters accidentally voted for Patrick Buchanan instead of Al Gore.



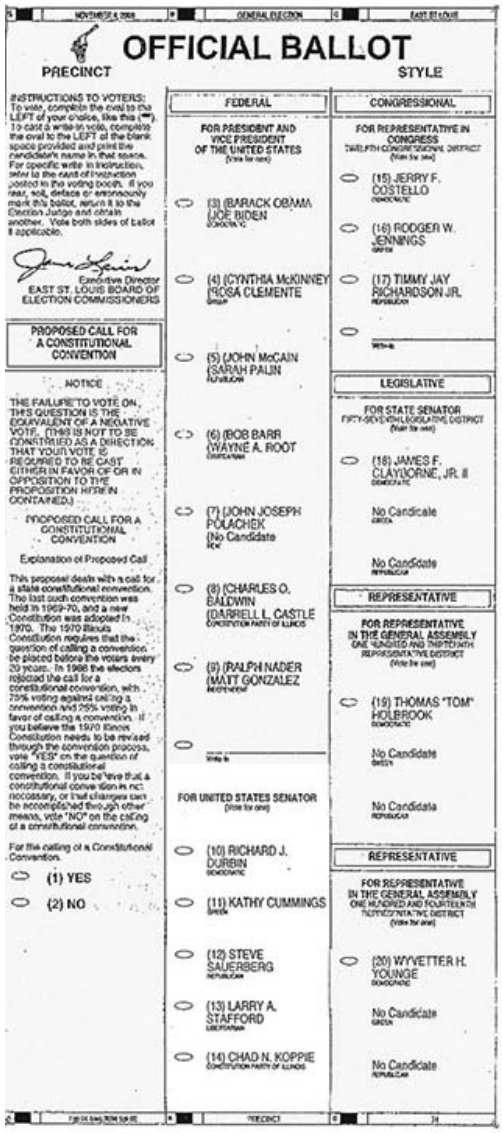
Palm Beach county's infamous butterfly ballot. (Wikimedia Commons)

We've made some progress since then, but we still likely lose hundreds of thousands of votes every election year due to poor ballot design and instructions. In 2008 and 2010 alone, almost half a million people did not have their votes counted due to mistakes filling out the ballot. Bad ballot design also contributes to long lines on election day. And the effects are not the same for all people: the disenfranchised are disproportionately poor, minority, elderly and disabled.

In the predominantly African American city of East St. Louis, the race for United States senator in 2008 was missing a header that specified the type or level of government (Federal, Congressional, Legislative, etc). Almost 10 percent of East St. Louis voters did not have their vote counted for U.S. Senate, compared to the state average of 4.4 percent. Merely adding a header could have solved the problem. Below you can see the original ballot and the Brennan Center redesign.

BEFORE

2008 East St. Louis, IL



OFFICIAL BALLOT

PRECINCT

STYLE

INSTRUCTIONS TO VOTERS:
To vote, complete the oval to the LEFT of your choice, like this (•). To cast a write-in vote, complete the oval to the LEFT of the blank space provided and print the candidate's name in that space. For specific write-in instruction, refer to the card of instruction posted in the voting booth. If you tear, soil, deface or erroneously mark this ballot, return it to the Election Judge and obtain another. Vote both sides of ballot if applicable.

Executive Director
EAST ST. LOUIS BOARD OF ELECTION COMMISSIONERS

PROPOSED CALL FOR A CONSTITUTIONAL CONVENTION

NOTICE

THE FAILURE TO VOTE ON THIS QUESTION IS THE EQUIVALENT OF A NEGATIVE VOTE. (THIS IS NOT TO BE CONSTRUED AS A DIRECTION THAT YOUR VOTE IS REQUIRED TO BE CAST EITHER IN FAVOR OF OR IN OPPOSITION TO THE PROPOSITION HEREIN CONTAINED.)

PROPOSED CALL FOR A CONSTITUTIONAL CONVENTION

Explanation of Proposed Call

This proposal deals with a call for a state constitutional convention. The last such convention was held in 1969-70, and a new Constitution was adopted in 1970. The 1970 Illinois Constitution requires that the question of calling a convention be placed before the voters every 20 years. In 1988 the electors rejected the call for a constitutional convention, with 75% voting against calling a convention and 25% voting in favor of calling a convention. If you believe the 1970 Illinois Constitution needs to be revised through the convention process, vote "YES" on the question of calling a constitutional convention. If you believe that a constitutional convention is not necessary, or that changes can be accomplished through other means, vote "NO" on the calling of a constitutional convention.

For the calling of a Constitutional Convention.

(1) YES

(2) NO

FEDERAL

FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

(3) (BARACK OBAMA JOE BIDEN)

(4) (CYNTHIA McKINNEY ROSA CLEMENTE)

(5) (JOHN McCAIN SARAH PALIN)

(6) (BOB BARR WAYNE A. ROOT)

(7) (JOHN JOSEPH POLACHEK No Candidate)

(8) (CHARLES O. BALDWIN DARRELL L. CASTLE)

(9) (RALPH NADER MATT GONZALEZ)

FOR UNITED STATES SENATOR

(10) RICHARD J. DURBIN

(11) KATHY CUMMINGS

(12) STEVE SAUERBERG

(13) LARRY A. STAFFORD

(14) CHAD N. KOPPIE

CONGRESSIONAL

FOR REPRESENTATIVE IN CONGRESS

(15) JERRY F. COSTELLO

(16) RODGER W. JENNINGS

(17) TIMMY JAY RICHARDSON JR.

LEGISLATIVE

FOR STATE SENATOR

(18) JAMES F. CLAYBORNE, JR. II

No Candicate

No Candidate

REPRESENTATIVE

FOR REPRESENTATIVE IN THE GENERAL ASSEMBLY

(19) THOMAS "TOM" HOLBROOK

No Candidate

No Candidate

REPRESENTATIVE

FOR REPRESENTATIVE IN THE GENERAL ASSEMBLY

(20) WYVETTER H. YOUNGE

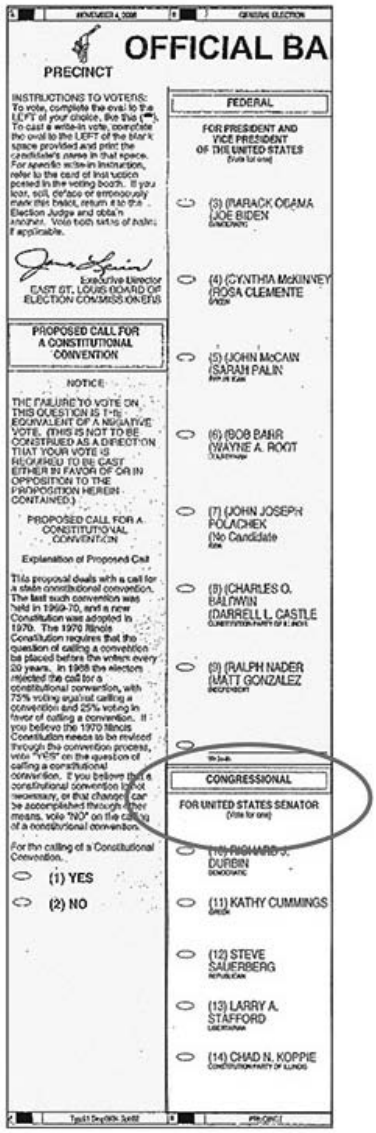
No Candidate

No Candidate

PRECINCT

AFTER

Revised ballot



OFFICIAL BA

PRECINCT

INSTRUCTIONS TO VOTERS:
To vote, complete the oval to the LEFT of your choice, like this (•). To cast a write-in vote, complete the oval to the LEFT of the blank space provided and print the candidate's name in that space. For specific write-in instruction, refer to the card of instruction posted in the voting booth. If you tear, soil, deface or erroneously mark this ballot, return it to the Election Judge and obtain another. Vote both sides of ballot if applicable.

Executive Director
EAST ST. LOUIS BOARD OF ELECTION COMMISSIONERS

PROPOSED CALL FOR A CONSTITUTIONAL CONVENTION

NOTICE

THE FAILURE TO VOTE ON THIS QUESTION IS THE EQUIVALENT OF A NEGATIVE VOTE. (THIS IS NOT TO BE CONSTRUED AS A DIRECTION THAT YOUR VOTE IS REQUIRED TO BE CAST EITHER IN FAVOR OF OR IN OPPOSITION TO THE PROPOSITION HEREIN CONTAINED.)

PROPOSED CALL FOR A CONSTITUTIONAL CONVENTION

Explanation of Proposed Call

This proposal deals with a call for a state constitutional convention. The last such convention was held in 1969-70, and a new Constitution was adopted in 1970. The 1970 Illinois Constitution requires that the question of calling a convention be placed before the voters every 20 years. In 1988 the electors rejected the call for a constitutional convention, with 75% voting against calling a convention and 25% voting in favor of calling a convention. If you believe the 1970 Illinois Constitution needs to be revised through the convention process, vote "YES" on the question of calling a constitutional convention. If you believe that a constitutional convention is not necessary, or that changes can be accomplished through other means, vote "NO" on the calling of a constitutional convention.

For the calling of a Constitutional Convention.

(1) YES

(2) NO

FEDERAL

FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

(3) (BARACK OBAMA JOE BIDEN)

(4) (CYNTHIA McKINNEY ROSA CLEMENTE)

(5) (JOHN McCAIN SARAH PALIN)

(6) (BOB BARR WAYNE A. ROOT)

(7) (JOHN JOSEPH POLACHEK No Candidate)

(8) (CHARLES O. BALDWIN DARRELL L. CASTLE)

(9) (RALPH NADER MATT GONZALEZ)

CONGRESSIONAL

FOR UNITED STATES SENATOR

(10) RICHARD J. DURBIN

(11) KATHY CUMMINGS

(12) STEVE SAUERBERG

(13) LARRY A. STAFFORD

(14) CHAD N. KOPPIE

Before: no header for the Senate race, after: consistent headers for all contests. (Brennan Center, Better Design Better Elections)

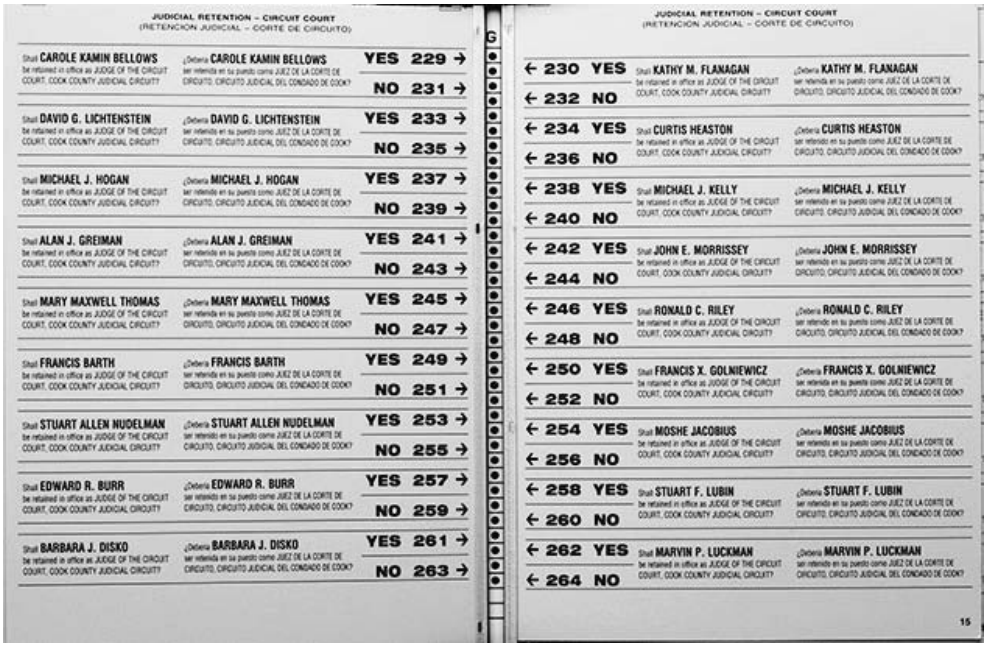
"When we design things in a way that doesn't work for all voters, we degrade the quality of democracy," said Whitney Quesenbery, a ballot expert and co-director of the Center for Civic Design, an organization that uses design to ensure voters vote the way they want to on Election Day.

Many mistakes can be avoided with tiny tweaks.

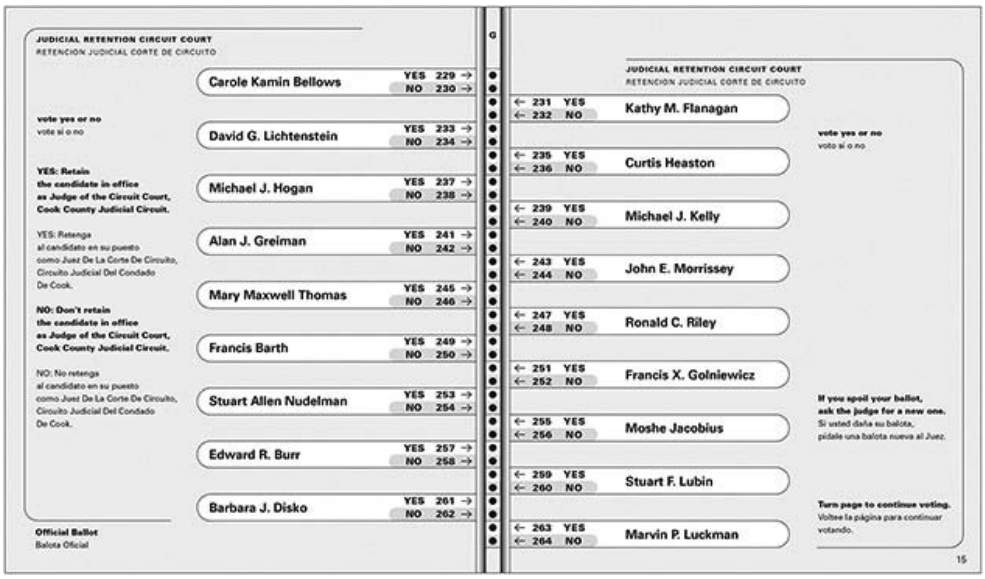
Designer Marcia Lausen, who directs the School of Design at the University of Illinois at Chicago, wrote a whole book about how democracy can be improved with design. She even tackles the infamous butterfly ballot. The 2000 Chicago Cook County judicial retention ballot crammed 73 candidates into 10 pages of a butterfly layout punch card ballot, with punch holes packed much more tightly together than in previous elections. As in Palm Beach, Yes/No votes for the candidates on the left page were confusingly interlaced with Yes/No votes for the right page.

Lausen's proposed redesign eliminates the interlaced Yes/No votes, introduces a more legible typeface, uses shading and outlines to connect names and Yes/No's with the appropriate punch holes, and removes redundant language.

BEFORE



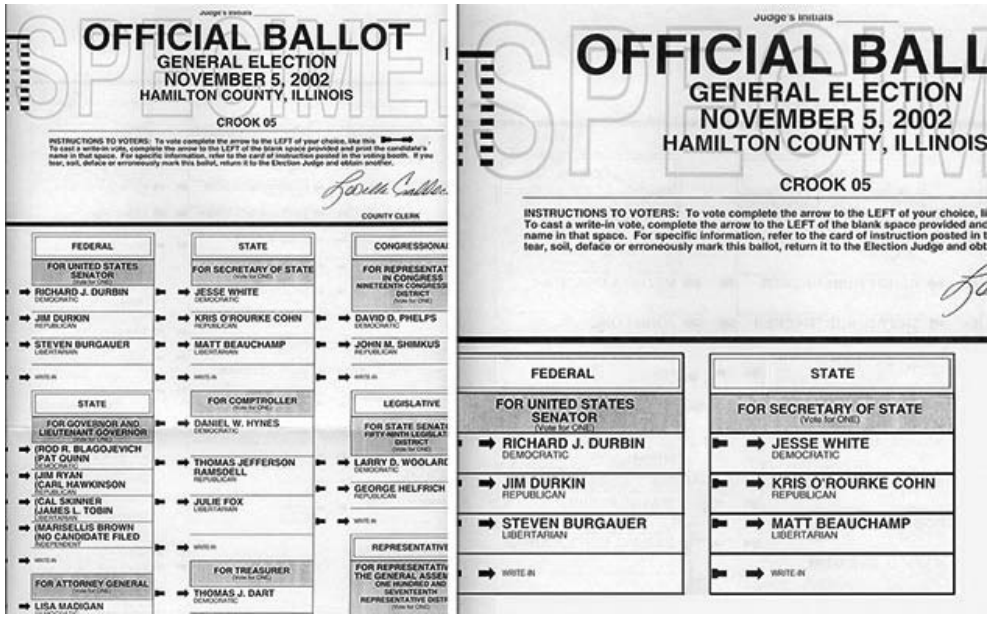
AFTER



Before and after butterfly ballots. (Design for Democracy)

In the 2002 midterm election in Illinois' Hamilton County, each column of candidate names was next to a series of incomplete arrows. Voters were supposed to indicate their choice of candidate by completing the arrow on the left of the candidate name. But because we read left to right and the candidate names in two races lined up perfectly, many voters marked the arrow to the right. As presented in a Brennan Center analysis, setting the columns a bit further apart and adding borders would have cleared up this confusion:

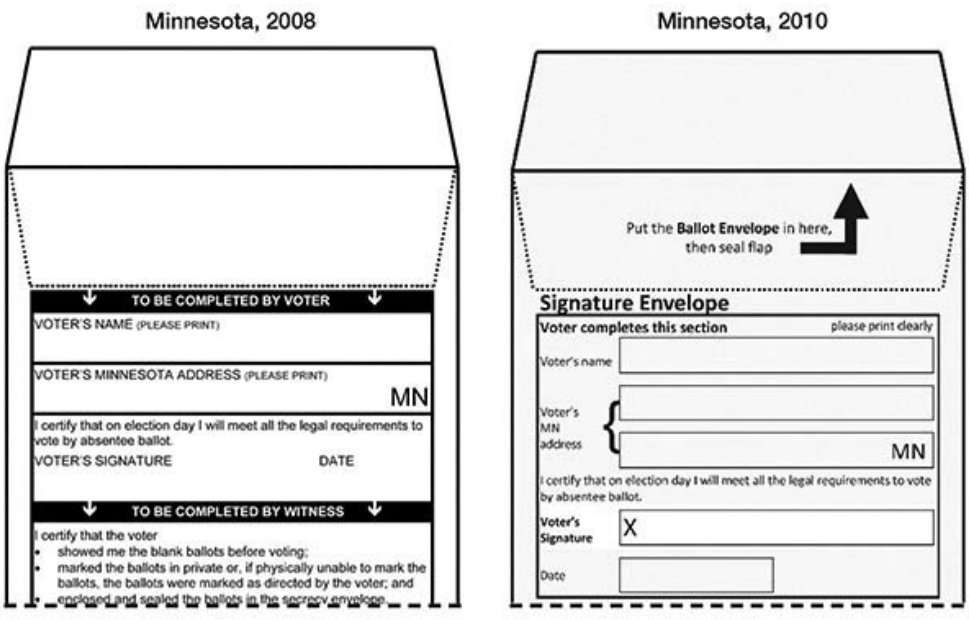
BEFORE AFTER



Illinois' Hamilton county confusing ballot, and suggested redesign. (Brennan Center)

In Minnesota in 2008, Al Franken beat Norm Coleman for the U.S. Senate seat by a sliver, less than 300 votes. In that race, almost 4,000 absentee ballots were not counted because the envelope was not signed. The Minnesota Secretary of State's office decided to redesign the mailing envelope. After a series of usability tests, they added a big X to mark where people should sign. In the following election in 2010, the rate of missing signatures dropped to 837. Below is the before and after from a Brennan Center report:

BEFORE AFTER



Minnesota absentee ballot mailing envelopes, in 2008 and redesign in 2010. (Brennan Center, Better Design Better Elections)

Minnesota's mailing envelope is a good example of how designers can solve design problems well before any election actually happens — by testing those ballots beforehand.

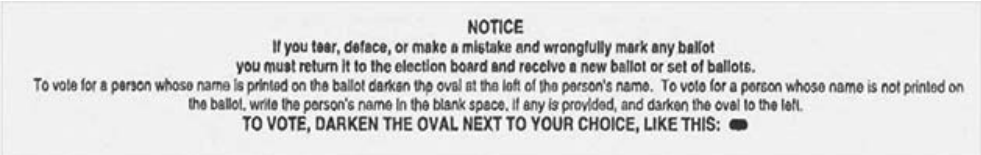
"Test and test and test," recommends Don Norman, a designer and cognitive scientist who wrote the book on designing objects for everyday life. The most important aspect of ballot design, he says, is considering the needs of the voters. He suggests doing extensive testing of ballots on a sample of people, which should include those who are "blind, deaf, or people with physical disabilities as well as people with language difficulties."

Bad instructions are a design problem, too.

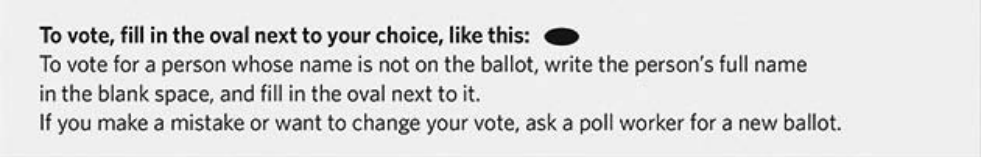
Beyond layout and ordering, the unanimous winner for worst part of ballot design? Instructions.

"The instructions are uniformly horrible!" said usability expert Dana Chisnell, who co-directs the Center for Civic Design with Quesenbery. Confusing jargon, run-on sentences, old-fashioned language left over from 100 years ago: all of these plague ballots across the country. Here are a few example instructions (the first from Kansas, the second from Ohio) along with the Brennan Center's redesign:

BEFORE

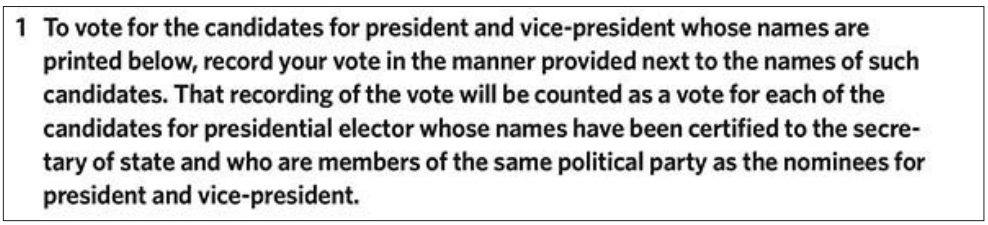

NOTICE
If you tear, deface, or make a mistake and wrongfully mark any ballot
you must return it to the election board and receive a new ballot or set of ballots.
To vote for a person whose name is printed on the ballot darken the oval at the left of the person's name. To vote for a person whose name is not printed on the ballot, write the person's name in the blank space, if any is provided, and darken the oval to the left.
TO VOTE, DARKEN THE OVAL NEXT TO YOUR CHOICE, LIKE THIS:

AFTER

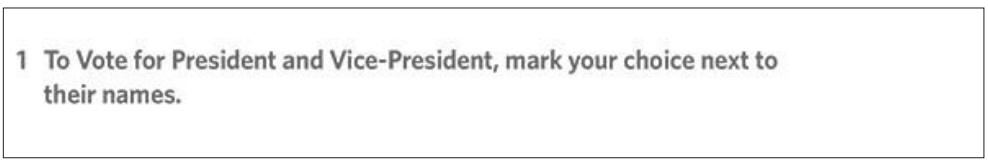

To vote, fill in the oval next to your choice, like this:
To vote for a person whose name is not on the ballot, write the person's full name in the blank space, and fill in the oval next to it.
If you make a mistake or want to change your vote, ask a poll worker for a new ballot.

(Brennan Center, Better Ballots)

BEFORE


1 To vote for the candidates for president and vice-president whose names are printed below, record your vote in the manner provided next to the names of such candidates. That recording of the vote will be counted as a vote for each of the candidates for presidential elector whose names have been certified to the secretary of state and who are members of the same political party as the nominees for president and vice-president.

AFTER

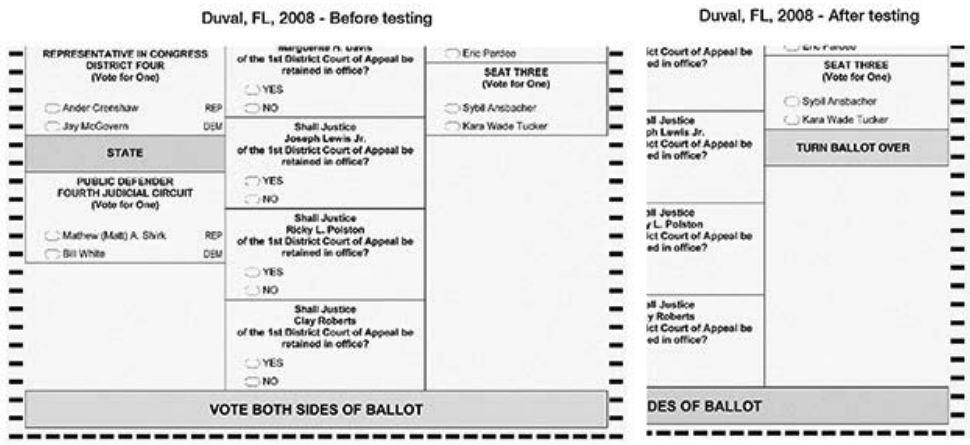

1 To Vote for President and Vice-President, mark your choice next to their names.

(Brennan Center, Better Ballots)

Even if the instructions are clear, placement of instructions has a huge effect on whether people understand them. In usability tests conducted in Florida's Sarasota and Duval counties in 2008, the majority of participants got to the end of the ballot and stopped. Which was a problem, because the ballot continued on the other side. Despite instructions specifically telling people to vote both sides of the ballot, they didn't.

So designers added three words to the end of the right column: Turn Ballot Over. The result? An estimated 28,000 fewer lost votes in the two counties that adopted the redesign. Here's the before and after:

BEFORE AFTER



(Brennan Center, Better Design Better Elections)

Designers have already put together guidelines for making better ballots.

Luckily, there are resources for how to help avoid these predictable problems. In addition to Lausen's book, the Design for Democracy initiative has worked for years at applying design principles to improve elections. A few years ago the design association AIGA combined forces with Whitney Quesenbery and Dana Chisnell to condense their best practices into a set of handy field guides.

The ballot-specific guide, Designing Usable Ballots, has this advice:

1. Use lowercase letters.
2. Avoid centered type.
3. Use big enough type.
4. Pick one sans-serif font.
5. Support process and navigation.
6. Use clear, simple language.
7. Use accurate instructional illustrations.
8. Use informational icons (only).
9. Use contrast and color to support meaning.
10. Show what's most important.

For the designers, these recommendations may seem obvious. But election officials — the ones responsible for laying out a ballot — are not designers.

Sometimes, reality thwarts good design.

Even if officials wanted to follow every design best practice, they probably wouldn't be able to.

That's because ballots are as complicated as the elections they represent. Elections in the U.S. are determined at the local level, and so each ballot must be uniquely crafted to its own jurisdiction. Ballots must combine federal, state, and local contests, display measures and propositions, and sometime require voters to express their choices in various formats — for example ranking their choices versus selecting one candidate for the job.

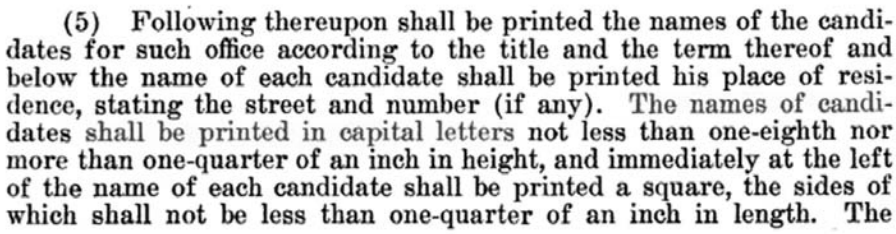
"There will always be special circumstances that present new problems for ballot design," said David Kimball, a political science professor at the University of Missouri-St. Louis who has written extensively on voting behavior and ballot design.

Take what happened this summer in California's Senate race primary. A record number of 34 candidates were running to replace incumbent Democrat Barbara Boxer, and the ballot needed to fit them all. In many counties, elections officials simply couldn't follow the good design recommendation of "Put all candidate names in one column."

To make matters worse, bad design is written right into the law.

Election officials are often constricted in what they can and can't do by specific language in their local election code. More often than not, the law is to blame for bad design.

For example, numerous jurisdictions require that candidate names and titles be written in capital letters. This goes against huge amounts of evidence that lowercase letters are easier to read. Other requirements like setting a specific font size, making sections bold or center-aligning headers make it next to impossible to follow all the design best practices.



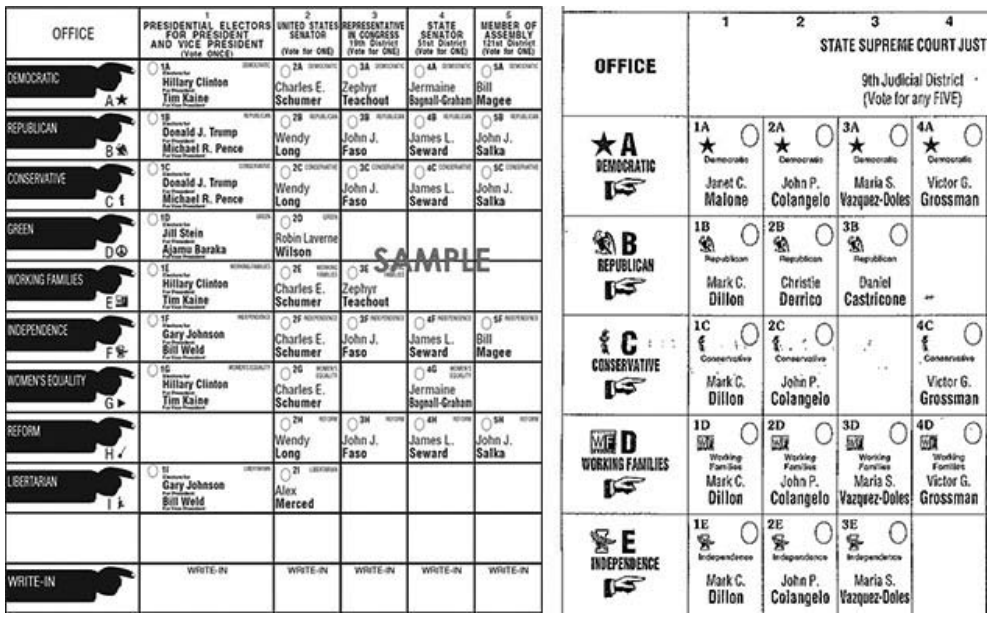
(5) Following thereupon shall be printed the names of the candidates for such office according to the title and the term thereof and below the name of each candidate shall be printed his place of residence, stating the street and number (if any). The names of candidates shall be printed in capital letters not less than one-eighth nor more than one-quarter of an inch in height, and immediately at the left of the name of each candidate shall be printed a square, the sides of which shall not be less than one-quarter of an inch in length. The

Illinois Election Code used to require candidate names to be printed in capital letters. (Statutes of the State of Illinois)

Some election code requirements just seem to invite clutter. In Kansas, a candidate's hometown must be listed under their name. In California, the candidate's occupation. Designers argue that this additional text complicates the ballot with needless information, but they can't get rid of it without breaking the law.

"It's amazing how many design prescriptions are written into law by non-designers," said designer Drew Davies, who has worked with numerous jurisdictions to improve their ballots and voting materials and is design director of AIGA's Design for Democracy.

Some of those prescriptions border on the comical. In New York, election law requires that each candidate name must be preceded by "the image of a closed fist with index finger extended pointing to the party or independent row." Here's how that actually looks on real New York ballots:



(Otsego County and North Castle, Westchester County)

In design, everything matters — even the order of the candidate names.

Some design problems are not as obvious as a pointing finger. Take something as simple as the order of the candidates' names. There is a well known advantage for being listed first on the ballot. The "primacy effect" can significantly sway elections, especially in smaller races not widely covered in the media where there is no incumbent. One study of the 1998 Democratic primary in New York found that in seven races the advantage from being listed first was bigger than the margin of victory. In other words, if the runner-up candidates in those races had been listed first on the ballot, they likely would have won.

As one report puts it, "a non-negligible portion of local governmental policies are likely being set by individuals elected only because of their ballot position." To combat this unconscious bias, some states have already mandated that names are randomly ordered on the ballot. Still, many states and jurisdictions do not have a standard system for organizing these names.

The future will bring new design challenges... but also new ways to make voting more accessible.

As more and more states adopt absentee and vote-by-mail systems, they make voting more accessible and convenient — but they also introduce new ways of making mistakes. And those errors are only caught after the ballot has been mailed in, too late to change. A polling place acts as a fail-safe, giving you the opportunity to ask a poll worker for help or letting you fill out a new ballot if yours gets rejected by the voting machine. But on an absentee ballot, if you made a mistake and your vote isn't counted, you'll never know.

There are several current efforts to overhaul the ballot entirely. Los Angeles County, for example, has teamed up with the design company IDEO to create an easier and more accessible way to vote. Their customizable device would let people fill out a sample ballot on their own time from a computer or mobile device, and then scan a code at the polling place to automatically transfer their choices to a real ballot.

The Anywhere Ballot is another open-source project that's designed to create a better voting experience for everyone — including voters with low literacy or mild cognitive issues. Their digital ballot template, which came out of extensive user

testing and follows all the current ballot design best practices, lets anyone use their own electronic device to mark a ballot.

But of course, the design problems that plague ballots affect all aspects of the voting process.

Voter registration materials, mailed voter guides and education booklets, election department websites and online instructions, poll worker materials — all of these have problems that can be improved with better design.

“Ballots are where all the drama happens,” said designer Lausen, “but there is much more to election design.”

From legalese to reader ease – plain language tips for plainer contracts

Lynda Harris has dedicated her career to championing the benefits of plain language. For more than 25 years, Lynda has been proving to businesses of all shapes and sizes that writing clearly is essential to their success. Her communications consultancy, Write Limited, is recognized as a market leader in plain language solutions both in New Zealand and internationally.

Lynda developed the WriteMark — New Zealand's document quality mark — and founded New Zealand's annual WriteMark Plain English Awards. The WriteMark Awards gained international attention, inspiring the United States Center for Plain Language to introduce its own ClearMark Awards. Lynda has been a guest judge for the ClearMark Awards since 2011.

Her best-selling book *Rewrite: How to overcome daily sabotage of your brand and profit* is a handbook for organizational change based on improving writing culture.

Lynda is the New Zealand representative for Clarity International.

www.write.co.nz
www.writemark.co.nz
www.rewriteforchange.com

By Lynda Harris

Our team of plain language specialists often redraft contract documents for clients who recognize that customers or clients need something better. As a company, we are often party to contracts and agreements with suppliers or clients. As a plain language company, we often find ourselves in two minds about signing these contracts or agreements. We often struggle to work our way through the requirements of requests for tender when trying to win projects. And we sigh when we come across longwinded partnership agreements when we just want to establish a straightforward, streamlined way of working with another organization.

After all, a contract is simply a legally binding agreement between two or more parties. Nothing in that definition says the contract needs to be wordy, difficult to understand, or full of complex clauses. But contract drafters often use outdated templates, form letters, and precedents that play a part in perpetuating unplain legal language.

In turn, difficult documents make life difficult for those who have to understand and agree to their terms. Legalistic contracts make an impression on readers that may unfavorably influence how they perceive the other party — and the agreement they're signing up to.

How often have you talked through an agreement and found the written document that follows up later to be vastly different in tone from the conversation you had? Sometimes at Write we can't help ourselves — we'll offer to redraft the document so we feel better about the whole arrangement.

A few months ago, I sent this email:

When we spoke, I mentioned my concern about the heavily legalistic style of the agreement reading it was certainly an arduous task that required focus and determination! I mentioned that the agreement didn't match my very positive perception of your company, a perception you created in our pleasant and easy conversations.

Having a plain English agreement will help to streamline your negotiations with suppliers and will match, instead of being at odds with, the image you want for your company. You agreed with me and asked for a quote to make the agreement more reader-friendly.

Why lawyers need to use plain language in contracts

Clients are demanding the right to easily understand legal contracts and other legal documents. Courts are more willing to hold that contracts can be unenforceable because people can't understand them.

We live in a high-information, highly connected society. The nature of digital information and the web leads to greater immediacy and transparency. Readers trust clarity and shun opaque content. They're losing patience with unclear language and they object to legalese.

Legalese has famously been described as a 'fog'[1] and a barrier to trust. It can distance readers and is sometimes labeled as pompous and archaic. Sometimes it's used because of habit, inertia, fear of change, or inappropriate notions of prestige.

PLAIN LANGUAGE IS SUPPORTED BY LEGISLATION

Mandatory plain language is taking hold in government and business around the world. Legislation supporting plain language is in place in the US, Canada, the UK, the European Union, Sweden, Denmark, South Africa, India, and Australia and New Zealand.

Studies in New Zealand have shown that both professional and non-professional readers found plain language versions of legislation easier to understand. Testing earlier drafts of legislation gave drafters valuable insights and feedback. Researchers found that content could be legally correct, but also clear and straightforward.

LAW FIRMS REALIZE THAT CLARITY IS A POINT OF DIFFERENCE

A strong business trend towards simplicity also demands plain language — it's no longer an optional extra. Writing clear contracts to suit the needs of readers strengthens relationships with clients, saves time and money, and boosts efficiency. Companies are recognizing that plain language is something that can define them.

As legal experts, lawyers are rightly sensitive about accuracy and logic. Plain language doesn't meddle with legal expertise, but does mean that it is communicated well. Text in plain language exposes any flaws in the logic of a line of thought. Complex ideas cry out for clear, simple, transparent prose. Presenting a complex topic simply to other experts and non-experts demands great skill. Every one of us can do better at stripping away clutter and ambiguity — some people describe this as 'pulling out the weeds to see the flowers'. What remains is uncluttered and clear.

"Plain language doesn't meddle with legal expertise, but does mean that it is communicated well."

CONTRACTS IN PLAIN LANGUAGE ARE FAIRER FOR ALL PARTIES

Contracts are working documents and binding guides to action. They need to engage people to read and understand them. Contracts in plain language can improve relationships, minimize risk, and prevent frustration.

And a plain language contract is not just a goal in itself — plain language contracts can help an organization do its job far better, whether that is serving people, making money, or both.

In our work for clients, we often find that rewriting a contract in plain language uncovers the truth. Recently when working on a consumer contract, we spelled out the requirements so plainly that the company reviewed their position to be more generous to the consumer. The bare provisions made the company look harsh. Sometimes you can't change the provisions, but it's much fairer to the customer of a finance agreement or a banking arrangement, for example, to understand the reality of what they'll have to pay back — before they sign.

How drafters can achieve plain language contracts

Plain language is shorthand for planning, organizing, writing, and presenting a document to suit the needs of readers. Plain language is not just about removing legalese.

NOTES

1 Kimble, Joseph, Lifting the Fog of Legalese: Essays on Plain Language, Carolina Academic Press, 2006

2 http://tiny.cc/xq9mfy

Broad guidelines for plain language contracts are to:

- plan, design, and organize the contract around the reader's needs
- construct sentences and choose words that are clear and precise for typical readers
- test mass documents on typical readers.

A plain language contract includes:

- a simple overview of who is hiring who, what they're being hired to do, when, and for how much
- what both parties agree to do
- what their responsibilities are
- the specifics of the deal
- what is, and what isn't, included in the scope
- a simple overview of liabilities and other legal matters.

Here are some tips for drafting contracts in plain language. Of course, these tips will work for all kinds of legal documents.

PLAY TO YOUR AUDIENCE

Keep the needs of both your primary audience and secondary audiences in mind. Write for the audience that is least likely to understand.

HAVE A CLEAR PURPOSE

What do your readers want to do with the document? What do you, as the writer, want them to do with it? State your purpose at the beginning — write a clear informative title for the contract. Avoid generic label titles like 'agreement' or 'contract'. Be explicit. Include a statement at the beginning in clear language explaining what the contract or agreement is about.

STRUCTURE ACCORDING TO YOUR READER'S NEEDS

Put important things first from your reader's point of view. Give your client an answer, not an essay. Rather than writing 'item, item, and item, therefore conclusion', write 'conclusion because of item, item, and item'.

SOUND LIKE A PERSON — NOT AN INSTITUTION

Choose an appropriate tone and degree of formality to suit your reader. Be dignified by being clear and readable rather than sounding 'lawyerish'. Use 'you' and 'we', and choose precise but familiar words. Consider using contractions.

ACTIVATE YOUR SENTENCES

Write in active-voice sentences: for example, 'the directors may issue shares', instead of 'shares may be issued by the directors'. Active voice leads to shorter, more concise sentences and helps readers connect with the main message.

Choose powerful verbs over abstract nouns. Replace abstract nouns (many of which end in 'ion', 'ment', and 'nce') with the verbs hiding inside.

There is an expectation = We expect

reach an agreement on = agree on

the governance will be undertaken by x = x will govern

CHOP UP SENTENCES

A good average sentence length is 15 to 20 words. Chopping up long sentences will make your meaning clearer and your reader happier. Keep to one main idea in each sentence — don't load sentences with complex clauses. Try using bulleted lists to break up long text.

REPLACE 'LEGAL FLAVORING' WITH PLAIN WORDS

accordingly = therefore / so

expedite = speed up

forthwith = now

furthermore = then, also, and

notwithstanding = despite, still, yet

whereas = but

prior to = before

shall = must

in view of the fact that = as, because

jurisdiction = authority, area

last will and testament = last will

on numerous occasions = often

terminate = end

subsequent to = after

the question as to whether = whether

willfully or negligently = deliberately or carelessly

with regard to = about, for

you are requested to = please

Look for more examples online or download a free ebook from Write Limited: *Unravelling Legal Jargon*.[2]

USE PEOPLE'S NAMES

Eliminate third person names whenever possible — words like 'employer / employee', 'lessor / lessee', 'the company', and 'the party' can add distance and confusion. Use real names or 'you' and 'your', 'we' and 'our'.

"Replace 'legal flavouring' with plain words."

DON'T KILL ONE BIRD WITH THREE STONES

Do away with doublets, triplets, and other repetition. Legal contracts can be full of unnecessary synonyms that add wordy padding. Watch out for repetition like 'any and all', 'give, devise and bequeath', 'fit and proper', 'due and payable', 'indemnify and hold harness', 'each and every'. Choose one precise word.

AVOID TERMS OF ART THAT KEEP READERS APART

A small number of mutually understood terms can be useful when writing to another lawyer, but they are a barrier when writing contracts for non-lawyers. Either explain the term or don't use it. Use an easier alternative. For example, if you are referring to the effect of estoppel, use 'stop' or 'prevent' instead: 'Because of what Mr Smith said to you at the time, the law prevents him from denying it now'.

USE DEFINITIONS SPARINGLY

A long list of definitions can get in the way of your main message. A reader's understanding of a term is often different from a specific legal definition. It may be easier to explain the concept in the text and not use a definition at all. Put any definitions at the end of the document and clearly mark the defined word.

LEAVE LATIN IN ANCIENT ROME

Archaic terms and obsolete formalisms belong in the past. Find modern equivalents.

inter alia = among others

per se = by itself

in situ = in position

viz = namely

DELETE RITUAL BEGINNINGS

Clusters of tired formulaic words at the start of sentences are often a meaningless waste of time for the reader and writer — for example: 'it is important to note that', 'it should be remembered that', 'at this point in time', 'we refer to previous correspondence and now advise that', and 'having regard to (or notwithstanding) the foregoing'. Delete these ritual phrases and begin with the main idea.

TAKE A POSITIVE APPROACH

Positive statements are easier to understand. For example, instead of: 'You may not … unless…', try: 'You may only … if…'.

LOOK APPROACHABLE — AVOID A WALL OF WORDS

Choose a plain, simple typeface.

White space is not a waste — a document with plenty of white space is more likely to be read and better understood. Add headings, vary paragraph length, use bullets, and add diagrams, tables, charts, and graphics to support text.

"White space is not a waste."

POINT THE WAY

Signpost important information for your reader. Use frequent headings, a clear and consistent numbering system, bullets, indenting, and bold to highlight.

REMEMBER DIGITAL IS DIFFERENT

Readers have less patience when reading online documents. They expect their key words to jump out at them immediately. If they don't see their key words, they give up. Use familiar words, frequent headings full of key words, small chunks of information, actionable content, and informative links.

PUT YOUR WRITING TO THE TEST

Read your words out loud, check with non-legal colleagues, ask yourself whether a particular family member would understand it, and ask clients for comments. Use checklists, style guides, and computer software to check for grammar and readability.

How we can all play a part in getting clearer contracts for all

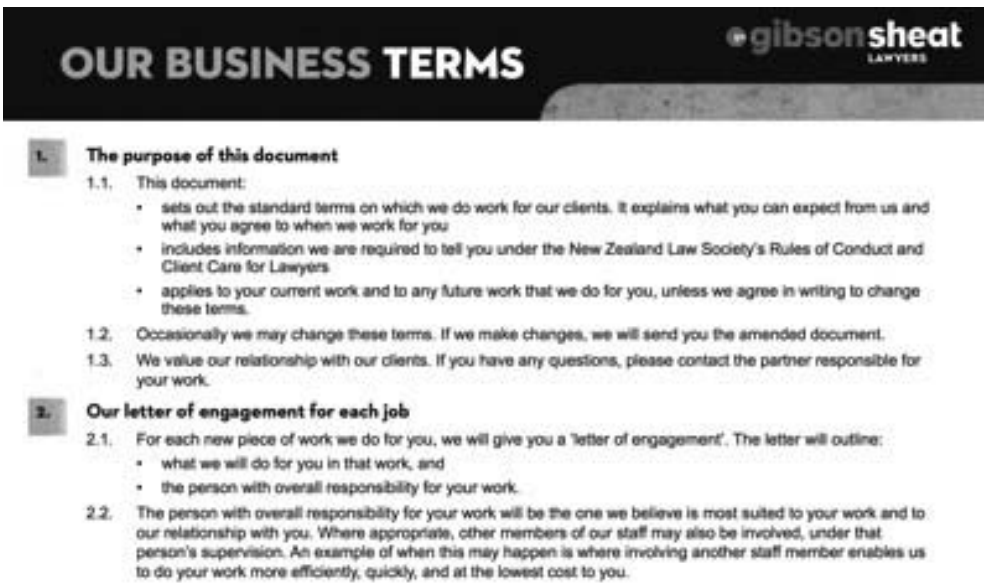
Use the tips listed above when drafting contracts. Remember the readers and show some empathy for their situations. Contracts often apply to major life decisions and commitments as well as important business arrangements. Consumers deserve clear contracts that they can read, understand, and act on.

When you have to sign a contract yourself, see if it matches up with what we've recommended here. If it doesn't, push back a little — even if you have to sign it first time around, try for a redraft when the contract comes up for renewal. At the very least, question anything you think isn't clear.

Take the opportunity to get involved in consultations about contracts. When government agencies change their procurement systems, they often call for submissions. When tendering processes are over, you're entitled to ask for feedback about your bid — and to give feedback about the process. Keep an eye out for consumer legislation that protects consumer rights and give your support — or apply the terms to documents you're creating.

What one New Zealand firm did to its terms of engagement

Gibson Sheat is an example of a firm that stands by its commitment to plain language. They redrafted their terms of engagement into a document that holds the WriteMark. This document quality mark is awarded to documents that are assessed as reaching a high standard of clarity.



OUR BUSINESS TERMS

gibsonsheat LAWYERS

1. The purpose of this document

1.1. This document:

- sets out the standard terms on which we do work for our clients. It explains what you can expect from us and what you agree to when we work for you
- includes information we are required to tell you under the New Zealand Law Society's Rules of Conduct and Client Care for Lawyers
- applies to your current work and to any future work that we do for you, unless we agree in writing to change these terms.

1.2. Occasionally we may change these terms. If we make changes, we will send you the amended document.

1.3. We value our relationship with our clients. If you have any questions, please contact the partner responsible for your work.

2. Our letter of engagement for each job

2.1. For each new piece of work we do for you, we will give you a 'letter of engagement'. The letter will outline:

- what we will do for you in that work, and
- the person with overall responsibility for your work.

2.2. The person with overall responsibility for your work will be the one we believe is most suited to your work and to our relationship with you. Where appropriate, other members of our staff may also be involved, under that person's supervision. An example of when this may happen is where involving another staff member enables us to do your work more efficiently, quickly, and at the lowest cost to you.

Gibson Sheat wanted to be clear about both parties' responsibilities. The firm has made simplicity part of its branding. Having a clear foundation agreement (now called 'Our Business Terms') between the firm and its clients sets the relationship off to a great start.

You can read more about Gibson Sheat in *Rewrite: How to overcome daily sabotage of your brand and profit*, by Lynda Harris (2015).

What's "The Deal"?: Designing mortgage disclosures that consumers can use and understand

Susan Kleimann, Ph.D.
In 1997, Susan Kleimann, Ph.D. founded her company, Kleimann Communication Group, to focus on the juncture of public policy and the documents intended to convey that policy to consumers. She has advocated for consumer testing in all projects with high impact documents.

With the Federal Trade Commission and an interagency working group of the 6 major financial regulatory agencies, she oversaw the development and testing of the Model Financial Privacy Notice, now used by nearly every U.S. financial institution. To fulfill the Consumer Financial Protection Bureau's obligations under the Dodd-Frank Act, she led the iterative development and testing of the Loan Estimate and Closing Disclosure (or TRID), now used for all home mortgage transactions—or more than 6 million in 2016.

Dr. Kleimann is the Chair of the Center for Plain Language and a member of the International Working Group to develop international standards on plain language, including the need for evaluation as central to those standards.

By Susan Kleimann and Barbra Kingsley

In a 2009 survey, 42% of adults, or more than 94 million people, reported having a home mortgage and, of those, 28% said that the terms of their mortgage turned out to be different than they expected. The issues consumers had included the payment or the terms of the loan were different than expected, the interest rate or its duration were different than expected, or they did not know they would need to pay private mortgage insurance (PMI).[1] In short, these 94 million people didn't know the deal they had agreed to. By August 2008, 9.2% of all U.S. mortgages outstanding were either delinquent or in foreclosure, and by September 2009, this number had risen to 14.4%.[2] At least some of these foreclosures were the result of consumers finding themselves in the midst of bad deals, deals they didn't understand—even if they tried—and mortgages that they could no longer pay.

Elizabeth Warren, then Special Advisor to President Obama, outlined her goal for the Consumer Financial Protection Bureau (CFPB): "The new consumer bureau is based on a pretty simple idea: People ought to be able to read their credit card and mortgage contracts and know the deal."[3] The CFPB was chartered to bring about positive change by protecting consumers as they navigate the maze of financial options available to them and by empowering them with information that helps them understand, shop, compare, and negotiate. One of the CFPB's first mandates was to develop clear and understandable mortgage loan disclosures to help consumers understand "the deal."[4]

In this project, our organization, Kleimann Communication Group, Inc., worked collaboratively with the CFPB Mortgage Disclosure Project team to iteratively design and qualitatively test a Loan Estimate disclosure to replace both the Truth-in Lending disclosure and the Good Faith Estimate, both currently given after applying for a loan. We also developed and tested a companion Closing Disclosure to replace the final Truth-in-Lending disclosure and the HUD-1, both of which are given during the closing when the final legal documents are signed and the purchase is complete.

Our Approach to the Loan Estimate Development

Disclosures, such as the Loan Estimate, must simultaneously be accessible yet satisfy the legal requirements; be clear yet convey complex information; be technical yet useful to the average citizen. In short, disclosures must serve varied purposes that can, at first glance, seem incompatible. To create a disclosure that works—and works for each of these purposes—requires a strong and innovative development process.

The goals of the Mortgage Disclosure Project were clear from the start: comprehension, comparison, and choice.

COMPREHENSION
- Understand the basic terms of a loan and its costs
- Understand immediate costs and costs over time

COMPARISON
- Compare one Loan Estimate with another
- Compare a Loan Estimate with the Closing Disclosure

CHOICE
- Choose the best loan for their situation with the Loan Estimate
- Identify differences between the Loan Estimate and Closing Disclosure and decide whether to close

Decisions about selecting, organizing, and presenting the information required more thought. The formative development process allowed us to experiment and explore very different ways of presenting and highlighting the information. The rigorous usability testing with consumers, over 10 rounds, drove a design-test sequence that fine-tuned content and design decisions

For the final proposed design of the Loan Estimate, we used a simple structure for the three-page disclosure that placed a summary of the loan terms and costs before the detailed information. This article discusses three elements that are that are critical to this, and every, disclosure project: a systems approach to communication, an understanding of consumer complexity, and designing for consumers.

Using a Systems Approach

The process of choosing appropriate financial products is, in itself, complex. The home-buying process, for example, is more than a singular financial transaction, as it includes many other considerations, including emotions and dreams. It is a long process that starts as soon as consumers begin looking for a home. Once they find a home, they enter into a contract and must find the mortgage loan. The home loan market offers a dizzying array of loan product choices. Aside from the often-confounding variations in loan products, consumers can shop among multiple lenders and negotiate multiple combinations of loan terms. The home-buying process ends (sometimes months later) when the consumers sit at the settlement table.

Consumers need disclosures that help them make complex, life-changing financial decisions, weigh risks, and understand the terms and conditions. At the outset, they need clear disclosures that help them make decisions about lenders, optimal loan products, and associated risks. At settlement or "closing," they need to have clear disclosures that allow them to compare the details of their loan against what they were promised. Additionally, when consumers work with multiple documents, they need formats that match across all documents. This matching enables them to find and compare relevant information across documents more easily.

KEY PRINCIPLES OF A SYSTEMS APPROACH
- Make loan documents easy to compare
- Put key comparative terms up front
- Demonstrate risks clearly
- Display both long- and short-term affordability elements

HOW WE ADDRESSED THESE PRINCIPLES

The Loan Estimate provides a summary of the key loan terms and costs. The design separates figures that show the basic loan terms (e.g., the principal and interest payment and loan costs) from figures that provide consumers with long-term affordability information (e.g., the total monthly payment), and short-term affordability information (e.g.,cash required to close). In the past, it was easy to miss some of these "fine print" type elements.

Barbra Kingsley, Ph.D. is a Partner with the Kleimann Communication Group in Washington, DC. She has over 20 years of experience developing plain language documents for government agencies including the Department of Health and Human Services and the Consumer Financial Protection Bureau. Her work has won awards from the Society for Technical Communication, the Center for Plain Language, and the National Association of Government Communicators.

Coupled to her work as information designer, Dr. Kingsley has extensive experience field-testing documents with end users. This testing assesses how well typical people can understand, navigate, and use information. She uses her extensive experience developing and testing information to create practical, hands-on training that conveys the principles of plain language and how to put them to use in everyday projects.

Dr. Kingsley was recently appointed lead judge for the Center for Plain Language's 2017 ClearMark Awards and has served as a judge for plain language competitions around the world, including the distinguished WriteMark New Zealand Plain English Awards.

NOTES

1 The National Foundation for Credit Counseling and Harris Interactive Inc., Public Relations Research, The 2009 Consumer Financial Literacy Survey, 2009, http://www.nfcc.org/newsroom/FinancialLiteracy/files/2009FinancialLiteracySurveyFINAL.pdf

2 Subprime Mortgage Crisis, 2012 http://www.stat.unc.edu/faculty/cji/fys/2012/Subprime%20mortgage%20crisis.pdf

3 "Warren, Elizabeth. Time to Get to Work on Consumer Protection. Wall Street Journal, 2010, http://blogs.wsj.com/washwire/2010/09/17/warren-time-to-get-to-work-on-consumer-protection/

4 Consumer Financial Protection Bureau, 2015, http://www.consumerfinance.gov/about-us/blog/know-before-you-owe-new-mortgage-disclosures-new-rule/

Loan Terms		Can this amount increase after closing?
Loan Amount	$162,000	NO
Interest Rate	3.875%	NO
Monthly Principal & Interest *See Projected Payments below for your Estimated Total Monthly Payment*	$761.78	NO

The new structure does not hide Loan Terms but, instead, places them in a prominent position that allows consumer to more easily notice and pay attention to them. It also allows for comparability; consumers can place two Loan Estimates next to one another and easily see the differences in the loans, thus helping them decide which has better terms for their situation. The Loan Terms are structured around questions such as, "Does the loan have this feature?" and "Can this amount increase after closing?" When these areas are filled out for different loans, they can help a consumer distinguish a simpler loan from a more complicated loan because there are fewer words on the page and the word NO is dominant. Risks are emphasized by the design; more complex loans look more complex and include more text.

	Does the loan have these features?	
Prepayment Penalty	YES	• **As high as $3,240** if you pay off the loan during the first 2 years
Balloon Payment	NO	

Additionally, short- and long-term affordability is demonstrated in the Projected Payments and in the Cash to Close sections. Projected Payments shows change over time—again a more complicated loan has more changes over time than a simpler loan. Additionally, the Projected Payments table allows the consumer to visualize "an adjustable rate" loan in the concrete by showing when and by how much payments will go up and affect the long-term affordability of the loan.

Understanding Consumer Complexity

At one level, this project was about designing disclosures—plain and simple. Yet nothing is plain or simple about the consumers who will use these disclosures. In truth, consumers, like all of us, are widely different, frustratingly indifferent to some information, naively trusting at times, frequently unaware of risks, and often willing to ignore anything that seems overly complex. At the same time, consumers are usually well intentioned and want to make good decisions. Disclosures give consumers information, yet consumers must take that information and transform it into actionable knowledge.

We used our knowledge of consumers—as well as consumer testing—to drive our design choices. For example, research shows that consumers go through a series of predictable stages when they encounter information: exposure, awareness, comprehension, retention/retrieval, and decision making.[5] Disclosures must support consumers at each of these cognitive processing stages.

They must also serve as active decision-making tools–anticipating and answering the questions consumers have about the financial process they are engaged in. Additionally, they must enable the consumers to complete tasks—for example, choosing an appropriate mortgage loan. We are not directing the consumer to a particular decision. The disclosures need to help consumers identify the information—the facts, risks, and conditions—related to their particular situations so they can make the best decision for themselves.

KEY PRINCIPLES OF UNDERSTANDING CONSUMER COMPLEXITY

- Support consumer cognitive processing stages
- Design with consumer questions in mind
- Orient information to real-life tasks

HOW WE ADDRESSED THESE PRINCIPLES

We created the Loan Estimate to activate consumers' interest in the information and help them pay attention—simple loan terms in large, bold font capture attention. By leveraging what we know about "how people think"—we designed a disclosure that works for them at the different stages of cognitive processing. In testing we saw that individuals first became aware of information that was new to them–such as the fact that certain adjustable-type loans changed over time. They then integrated this information and began to use it to compare to other types of loans (such as fixed loans with no changes over time) to better choose for themselves. They then retained key information and made more complicated trade-offs, such as deciding if they would prefer to put more cash to close down (higher short term cost, lower long-term cost) or accept a higher monthly payment (higher long-term costs, lower short-term cost).

Projected Payments

Payment Calculation	Years 1-7
Principal & Interest	$761.78
Mortgage Insurance	+ 82
Estimated Escrow *Amount can increase over time*	+ 206
Estimated Total Monthly Payment	$1,050

We also designed the first page of the Loan Estimate to answer basic questions consumers have about a mortgage loan such as, "What will my monthly payment be?"; "What is the interest rate?"; "How much cash do I need to bring to closing?" However, we also designed it to address more complex questions that consumers may not even know to ask, such as, "How will this loan affect me over time?"; "Will I have to pay more later?"; "Does the interest rate change?; "If so, how and when?" All of these questions are answered on the first page. There are no "hidden" terms or fine print that could hurt a consumer later.

Designing for Consumers

A typical, surface-level approach to improving disclosures and the supplemental materials is to simplify the language into plain language or to modify existing presentations. In such an approach, simpler words replace legal language to clear out the "gobbledygook." Though an important and necessary step, it does not go far enough. Both our experience and the research show that consumers, whether highly literate or not, can better use information that combines visuals with words. Visual design is about arranging text so that it helps to show the relationship of one piece of information to another and to guide the reader to critical information.

Consumers don't read sequentially. They skip through a document looking for answers to their questions. As a result, they need to be able to find information in a disclosure or document easily; they need to find the details of the information and the organizing principle underlying the document. Finally, when one goal of a document—such as a disclosure—is for people to compare, it's important to include a sense of the "whole" and of the "part."[6] For example, in developing this disclosure, we held basic content standard. So even though not all loans have a prepayment

5 McGuire, W. J., Some Internal Psychological Factors Influencing Consumer Choice, Journal of Consumer Research, 1976

penalty or a balloon payment, these two items were on page 1 of all disclosures to help consumers more easily compare loans that have them and loans that do not. To some extent, this "whole to part" approach lets consumers see and understand all options in a standardized way.

KEY PRINCIPLES OF DESIGNING FOR CONSUMERS

- Balance the visual and verbal
- Create a strong internal structure that orients consumers to the whole and the parts
- Design to enhance navigation and help consumers find relevant information

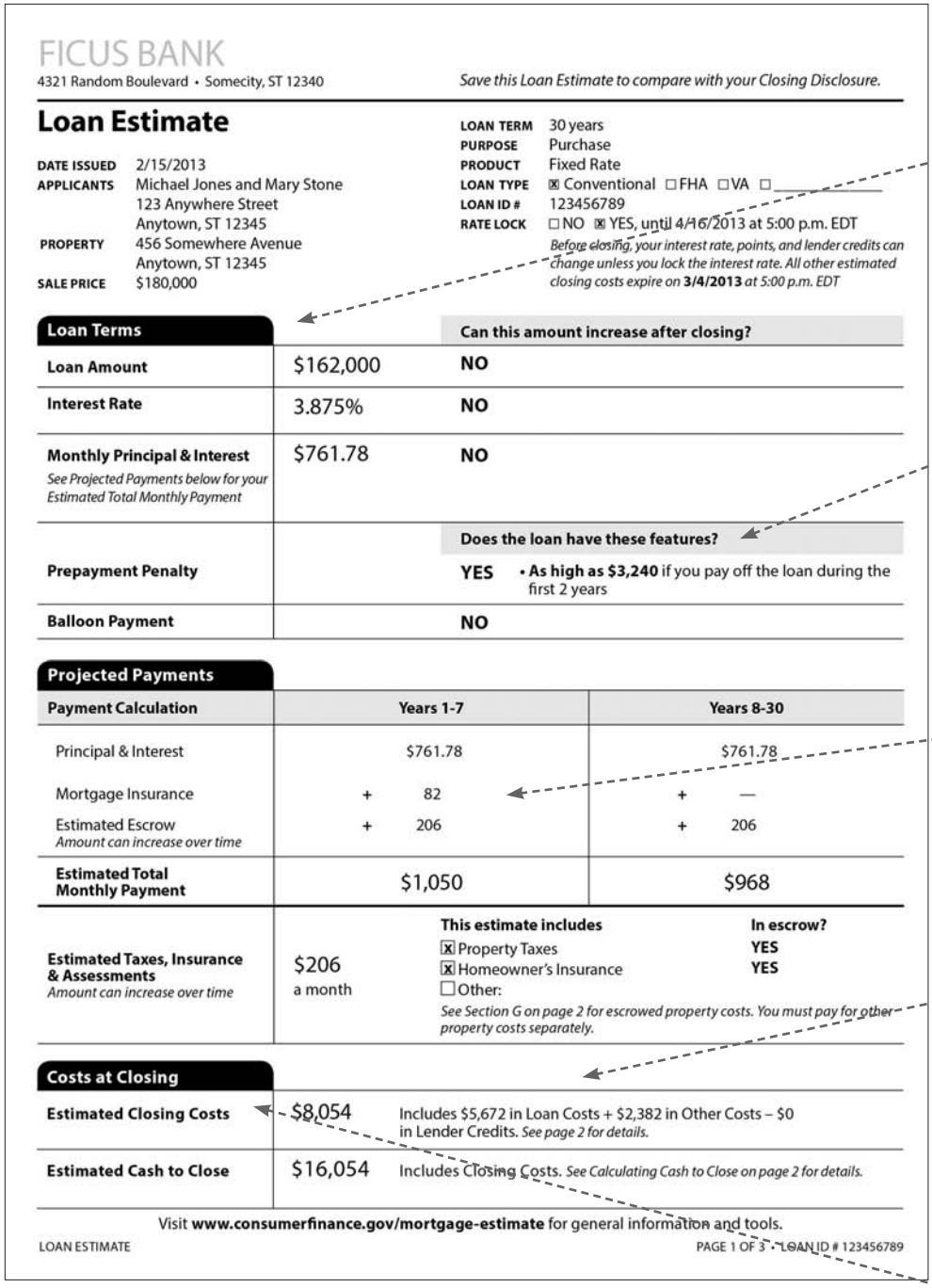
HOW WE ADDRESSED THESE PRINCIPLES

By using a strong internal structure, we enabled consumers to better find information they want and need. The Loan Estimate uses an easy-to-scan tabular grid and visual markers, such as reverse tab headings. Consumers can easily scan to find critical information for their situation. This visual road map is even more important for low literacy consumers or consumers who are often unfamiliar with this type of content. It aids in comparability and comprehension–giving consumers a standard structure that can be compared across loans. They can also identify the whole–such as Projected Payments—and the parts that make that up—such as principal and interest, mortgage insurance, and estimated escrow. Therefore consumers are able to view the loan at a high level while also drilling down into critical parts that will impact them.

6 Garrison, L., Hastak, M., Hogarth, J., Kleimann, S., and Levy, A., Designing evidence-based disclosures: A case study of financial privacy notices, Journal of Consumer Affairs, 2012

7 Kleimann Communication Group, Know Before You Owe: Quantitative Study of the Current and Integrated TILA_RESPA Disclosures, 2013.

Page 1 of Loan Estimate



FICUS BANK
4321 Random Boulevard • Somecity, ST 12340

Save this Loan Estimate to compare with your Closing Disclosure.

Loan Estimate

DATE ISSUED	2/15/2013
APPLICANTS	Michael Jones and Mary Stone 123 Anywhere Street Anytown, ST 12345
PROPERTY	456 Somewhere Avenue Anytown, ST 12345
SALE PRICE	$180,000

LOAN TERM	30 years
PURPOSE	Purchase
PRODUCT	Fixed Rate
LOAN TYPE	☒ Conventional ☐ FHA ☐ VA ☐ _____
LOAN ID #	123456789
RATE LOCK	☐ NO ☒ YES, until 4/16/2013 at 5:00 p.m. EDT *Before closing, your interest rate, points, and lender credits can change unless you lock the interest rate. All other estimated closing costs expire on* **3/4/2013** *at 5:00 p.m. EDT*

Loan Terms		**Can this amount increase after closing?**
Loan Amount	$162,000	**NO**
Interest Rate	3.875%	**NO**
Monthly Principal & Interest *See Projected Payments below for your Estimated Total Monthly Payment*	$761.78	**NO**
		Does the loan have these features?
Prepayment Penalty		**YES** • **As high as $3,240** if you pay off the loan during the first 2 years
Balloon Payment		**NO**

Projected Payments		
Payment Calculation	**Years 1-7**	**Years 8-30**
Principal & Interest	$761.78	$761.78
Mortgage Insurance	+ 82	+ —
Estimated Escrow *Amount can increase over time*	+ 206	+ 206
Estimated Total Monthly Payment	$1,050	$968

Estimated Taxes, Insurance & Assessments *Amount can increase over time*	$206 a month	**This estimate includes** ☒ Property Taxes ☒ Homeowner's Insurance ☐ Other: *See Section G on page 2 for escrowed property costs. You must pay for other property costs separately.*	**In escrow?** **YES** **YES**

Costs at Closing		
Estimated Closing Costs	$8,054	Includes $5,672 in Loan Costs + $2,382 in Other Costs – $0 in Lender Credits. *See page 2 for details.*
Estimated Cash to Close	$16,054	Includes Closing Costs. *See Calculating Cash to Close on page 2 for details.*

Visit **www.consumerfinance.gov/mortgage-estimate** for general information and tools.

LOAN ESTIMATE PAGE 1 OF 3 • LOAN ID # 123456789

Uniform sections allow consumers to compare (1) different loan estimates to one another, and (2) the final closing disclosure with initial estimates.

Loan terms answers basic questions that users would have about the loan and emphasizes unique situations (such as "pre-payment penalties") which could harm consumers.

Projected Payments shows affordability information and helps consumers envision long-term effects of the loan.

Costs at Closing answers a key consumer question: how much cash do I need to close?

Reversed tab headings allow consumers to more easily find key information and navigate the disclosure

Providing Evidence for Government and Industry

Despite the 10 rounds of qualitative testing that the Loan Estimate underwent as we developed and fine-tuned the design and content, the CFPB wanted to have validation and proof that the new disclosures worked better than the Truth-in-Lending disclosure and the Good Faith Estimate. They also wanted to provide evidence to industry that the change would be worth the cost of adapting their systems to the new disclosures. We worked with survey experts and CFPB's Disclosure Development Team to compare the performance of 858 participants in 20 locations in four areas:[7]

- Disclosure type (current vs. proposed);
- Loan type (fixed rate vs. adjustable rate);
- Difficulty (easier loans vs. more challenging loans); and
- Consumer (experienced vs. inexperienced).

Each participant had four primary tasks. First, each reviewed 2 loan offers, chose one of them, and explained why that was the choice. Second, each compared the terms of the two loan offers by answering comparative questions. Third, each answered detailed questions about one of the loan offers. Fourth, each compared the loan offer with the final disclosure and answered questions about the final disclosure.

The results were remarkable. The proposed disclosures had statistically significant performance on all of the aggregate measures, on the tasks, and in all concept areas (e.g., interest rate, escrow account, loan amount, monthly payments, mortgage insurance, and closing costs). These findings occurred regardless of the experience level of the participant, for both fixed and adjustable loan types, and regardless of the loan complexity. In addition, participants with the proposed disclosures listed more comments to explain their choices.

In terms of the overall goals that the CFPB had set,

- Consumer **comprehension** with the proposed disclosures rose 15.5%
- Consumer **comparison** between the initial to closing disclosures rose 14.1%
- Consumer ability to make an informed **choice** on a loan product rose 24.1%

Conclusion

But, when we put the disclosures into the field and consumers must actually use them, how do they perform with the fine print that is so off-putting for most people? Certainly our qualitative testing results with over 96 consumers demonstrated that consumers could

- comprehend the disclosures,
- make tradeoffs between two disclosures,
- choose a loan and explain a rationale for their choices, and
- use the disclosures to compare initial and final loan terms and costs.

In May 2014, the Loan Estimate won the coveted Center for Plain Language Grand ClearMark Award, as the best plain language document of the year. News articles in the *Washington Post, U.S. News and World Report* have praised the Loan Estimate with the *Wall Street Journal* noting that: "Consumers can now easily check whether the loan amount, interest rate, monthly payment, escrow sum and the amount that a borrower needs to bring to the closing (a new feature) have changed from the lender's initial estimates".[8]

But even as time passes, the positive effects of the new disclosures continue to amass. In May 2016, the American Land Title Association released its survey that found 92% of homebuyers are reviewing their mortgage documents before closing on the loan since the Truth-in-Lending Act/Real Estate Settlement Procedures Act integrated disclosures, or TRID, went into effect in October 2015.[9] In sum, consumers can understand "the deal."

For more information about the project, results, and to see the updated final designs, please visit www.cfpb.gov.

8 Martin, A., What to Know About the New Mortgage Forms, 2015, http://www.wsj.com/articles/what-to-know-about-the-new-mortgage-forms-1443623646

9 Stanley, W.M. ALTA Survey Shows More Homebuyers Reviewing Mortgage Disclosures, American Land Title Association, 2015 http://www.alta.org/press/5-16-2016%20TRID%20Survey%20Results%20-%20Round%202.pdf

Consumer testing to avoid the Dodd-Frank Act's UDAAP tripwire

By Richard Horn

The issues surrounding the ability of consumers to understand the terms of their consumer financial products have come to the forefront since the recent financial crisis. The financial crisis was centered around the mortgage industry, especially the purchase and sale of complex derivative financial instruments based on the performance of pools of mortgage loans. Experts blamed the financial crisis, in part, on the inability of consumers to understand the terms of the loans that mortgage lenders and brokers sold them. For example, one article asserted that a "central problem" of the financial crisis "was that many borrowers took out loans that they did not understand and could not afford."[1] Some experts believed that the government should prohibit certain products that it deemed unsafe for consumers. For example, then professor and now Senator Elizabeth Warren (2007) wrote, "in a rapidly changing market, customers need someone on their side to help make certain that the financial products they buy meet minimum safety standards."[2] The U.S. Congress addressed both of these issues when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which was signed by President Obama on July 21, 2010.

> "Experts blamed the financial crisis, in part, on the inability of consumers to understand the terms of the loans that mortgage lenders and brokers sold them. "

To address the ability of consumers to understand their mortgage loans, the Dodd-Frank Act created the Consumer Financial Protection Bureau ("CFPB") and required it to create new disclosures for the mortgage industry within its first years of existence. Congress set forth the purpose of the new disclosures as to "aid the borrower…in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures.''[3] Congress appears to have wanted to improve upon the disclosures in place during the financial crisis. To satisfy this purpose, the CFPB conducted 17 rounds of qualitative consumer testing consisting of one-on-one interviews with over 100 consumers and industry participants, as well as an extensive quantitative study of the mortgage disclosures with 858 consumers, before issuing its disclosures. The CFPB began requiring these new mortgage disclosures to be used by mortgage lenders when a consumer applies for a mortgage loans and closes on a mortgage loan in October 2015.

In addition, to prevent the "unsafe" products and practices of the type that concerned then-Professor Warren, the Dodd-Frank Act also gave the CFPB authority to issue rules to prohibit and to enforce against unfair, deceptive, or abusive acts of practices (this is commonly referred to using its acronym, "UDAAP"). Specifically, the Dodd-Frank Act makes it unlawful to engage in a UDAAP and allow the CFPB to take any action to prevent a UDAAP.[4] The CFPB views UDAAP very seriously. The agency has ordered companies that it found committed UDAAPs to pay penalties as high as tens of millions of dollars.

Richard Horn led the final TILA-RESPA Integrated Disclosure rule (TRID) rule while a Senior Counsel & Special Advisor in the Office of Regulations of the Consumer Financial Protection Bureau (CFPB). He also led the CFPB's design and consumer testing of the TRID disclosures. Richard is one of the foremost experts on the rule. He is currently in private practice at Richard Horn Legal, PLLC.

Prior to joining the CFPB, Richard was a Senior Attorney at the Federal Deposit Insurance Corporation (FDIC) in the New York Regional Office. At the FDIC, Richard worked on consumer compliance and risk management supervisory matters and enforcement actions.

Richard advises banks, credit unions, non-bank mortgage lenders and brokers, investors, title insurance companies, and technology companies on all federal and state consumer finance regulatory compliance matters, including TRID, UDAAP, and state licensing laws.

NOTES

1 Barr, Michael, Mullainathan, Sendhil, Shafir, Eldhar, The Case for Behaviorally Informed Regulation, In New Perspectives on Regulation, 2009

2 Warren, Elizabeth, Unsafe at Any Rate, In Democracy: A Journal of Ideas, Summer 2007, No. 5

3 12 U.S.C. §§ 2603(a), 5532(f); 15 U.S.C. § 1604(b)

4 12 U.S.C. §§ 5531, 5536

But while UDAAP is aimed at preventing products and practices, at its core, it is also a law based on consumer understanding. The definitions of "unfair," "deceptive," or "abusive" that apply to this law are, in large part, based on the consumer's understanding of the acts or practices in question – for example, the industry's communications and advertisements or the descriptions of the terms of a product. This means that ensuring consumer understanding can be used to avoid the tripwire of UDAAP.

It is easy to see how this works if we look at the definitions. The definition of "unfair" is, in part, an act or practice that causes or is likely to cause substantial injury to consumers and which is not "reasonably avoidable by consumers." Whether something is reasonably avoidable, in part, depends on whether the consumer understands the offending act or practice, such as a product term. For example, if a consumer understands that a lender will conduct a certain act or practice and its terms, most likely the consumer could avoid that act or practice.

The definition of "deceptive" is, in part, that a representation, omission, or practice "misleads or is likely to mislead the consumer," and that a consumer's interpretation of it is considered reasonable under the circumstances. Whether something is deceptive, therefore, depends on what consumers understand from an industry representation or practice . For example, if most consumers understand a lender's advertisement about a product, then it is likely not misleading.

The term "abusive" is defined, in part, as an act or practice that materially interferes with "the ability of a consumer to understand" a term or condition of a consumer financial product or service. It is also, in part, an act or practice that takes unreasonable advantage of a "lack of understanding" on the part of the consumer of the material risks, costs, or conditions of the product or service. This definition is clearly based on a consumer's ability to understand a product. For example, if consumers are able to understand completely a product or service, then it would be difficult to show abuse.

A difficult aspect to UDAAP for the industry is that these definitions are general. They do not consist of specific acts or terms that industry products or services must meet. Instead they generally describe the type of activity that would violate this prohibition against UDAAP. For this reason, the industry must take care in analyzing its various products and services, advertisements, and practices to ensure there are no potential UDAAP concerns.

But because UDAAP has a foundation in consumer understanding, to prevent or defend against claims of UDAAP, the entire consumer financial services industry should consider using the same consumer testing tools that the CFPB used to ensure its own mortgage disclosures were understandable to consumers. While many industries conduct consumer testing for marketing purposes to gauge consumers' preferences, this form of consumer testing would need to be based on performance rather than preference. The CFPB's consumer testing of its mortgage disclosures was focused on performance, not preference. The testing focused on whether the participants could use the disclosures to understand the loans presented to them

"because UDAAP has a foundation in consumer understanding, to prevent or defend against claims of UDAAP, the entire consumer financial services industry should consider using the same consumer testing tools that the CFPB used to ensure its own mortgage disclosures were understandable to consumers"

and select the loan that was right for them. The industry could conduct testing such as this to ensure that consumers understand an advertisement, the terms of a product, or how the product works. For example, a lender planning to issue an advertisement can conduct such consumer testing to ensure that consumers understand the advertisement, or that the advertisement does not misrepresent any material facts. And if a government regulator did claim that an advertisement was deceptive, the lender could potentially use that same testing to defend against that claim.

There is also an additional benefit to a lender that conducts this kind of testing. It can build trust with its consumers. For example, a lender conducting testing of its advertisements may find that consumers begin to view the lender more favorably, because they understand the lender's communications better. This trust can result in more customers and increase a company's bottom line.

Consumer testing is a tool used by government agencies to improve required disclosures, but it can also be an important tool to the industry to build trust with consumers and prevent and defend against potentially costly UDAAP claims.

BOOK REVIEW

Legislative Drafting: Step-By-Step
by Arthur J. Rynearson

Dr. Tonye Clinton Jaja holds a PhD in law (legislative drafting) degree from the University of London. He also obtained a Master in Laws (LLM) in legislative drafting degree from the Nigerian Institute of Advanced Legal Studies, University of Lagos campus.

Legislative Drafting is an emerging area of legal profession that focuses on the methods and processes for drafting of legislation, amendment of legislation and law reform.

Dr. Tonye Clinton Jaja, is currently employed as a legislative drafting lawyer for Nigeria's National Assembly (National Institute for Legislative Studies-NILS) where he is also a law lecturer on the University of Benin/ NILS Masters in Legislative Drafting programme.

He has worked as part of the Legal Team that drafted several pieces of legislation such as the Digital Rights Bill. On the international law scene, Dr. Jaja has been engaged by several international organizations and even foreign governments to provide legislative drafting training and services.

Reviewed By Dr. Tonye Clinton Jaja

"It is hard for an American to evaluate a book that criticizes the drafting of statutes in the United Kingdom on the basis of "the continental system" as exemplified by France, Germany, and Sweden. Being unfamiliar with the latter and only generally familiar with the former, I can only comment on the author's analysis and recommendations in the light of American experience."[1] According to this quote by Dickerson, it would be difficult for a Nigerian like myself to evaluate Arthur Rynearson's *Legislative Drafting: Step-by-Step* considering that I am unfamiliar with the system of legislative drafting in the United States Senate. For this reason, I "can only comment on the author's analysis and recommendations in the light of the American experience."

In this regard the relevant question to ask is whether the author, Arthur Rynearson, has achieved the primary objective(s) for writing the book, *Legislative Drafting: Step-by-Step*. The first question is: what is the primary objective of the author in writing the book, *Legislative Drafting: Step-by-Step*? In the author's own words, the book "is designed to assist all who read, write, or use legislation to better understand the basics of legislative drafting and the important role that well-written legislation plays in promoting the rule of law…[and] provide a five-step framework for drafting legislation:

1. Legalize - achieving the intended legal effect.
2. Formalize - choosing the right legislative vehicle.
3. Integrate - relating new law to existing law.
4. Organize - organizing the legislative text.
5. Clarify - achieving clarity of expression."

Judging the author by his own words, it could be argued that the book has achieved its primary objective(s) to the extent that the author has devoted 164 pages of the book to providing details of how to perform the five-step framework. In addition, the author has provided additional guidance materials within the Appendix section of the book. The Appendix section is very helpful as it provides background information on the relevant context within which the five-step framework applies namely.

In addition the book lives up to its self-acclaim as a "manual" and "checklist" considering that it provides "How to do" sections in each chapter's discussion of the method for applying each of the five step framework. Appendix B of the book also provides precedents of the forms of bills, resolutions and other legislative documents that would assist the reader or user of the manual. This approach, as the author rightly argues, "offers the drafter the best chance to save hours of trial and error." This is a more modern approach to undertaking the legislative drafting task unlike the traditional trial and error method which the author himself underwent as he admitted: "I learned from doing."

This checklist and manual approach of the book is consistent with the prevailing view amongst legal academics and legal practitioners that a legislative "drafter acts both as an artist and a scientist. As a scientist, the drafter knows that choosing a particular relationship of law, form, or words will produce a predictable legal, procedural, or interpretative result…As an artist, however, the drafter must exercise judgment in applying the correct relationships to any given legislative blueprint using what the drafter knows about the legislative intent of the political actors involved."[2]

Chapter two, "How to choose the Right Legislative Vehicle," is one particular aspect in which this book stands out from other textbooks on legislative drafting. This chapter, in addition to the precedents contained in the Appendix, elaborates on other legislative documents such as resolutions and legislative vetoes which are not typically discussed in other major textbooks on the subject. Primary legislation, subsidiary legislation, and amendment legislation are almost always the core topics that are discussed in other legislative drafting textbooks. This addition is significant considering that, more often than not, legislative drafters are required to draft bills, resolutions, motions, lead debates and other forms of legislative documents other than primary and secondary legislation. This is the current practice and experience of legislative drafting lawyers such as myself who are in the employ of the National Assembly (national/federal legislature) of Nigeria.

Another commendable feature, which non-U.S. legislative drafters can learn from is: "An earmark (known to drafters as a 'minimum allocation') is a fencing or set aside of funds to be available only for a specific purpose…is a useful legislative tool by which Congress prioritizes government spending. By restricting the executive branch, it acts as a strong inducement for implementation of a law the way Congress desires." For example, in Nigeria, *virement* is the only constitutionally approved legislative method for making adjustments to the national budget in the event that the Executive branch discovers discrepancies after submission and passage of the budget legislation. It is a cumbersome legislative process that involves enactment of a new Bill through the Senate of the National Assembly. In comparison, the USA Congress method of "earmark" is a much more preferred and less cumbersome method.

Another noteworthy element is the author's ability to demonstrate the connection and linkage between the five-step legislative drafting framework and "rule-of-law values." The author elaborates on this at pages 162 and 163 of his book. This discussion is important considering that it is now almost universal that democracy and rule of law values are the underpinnings of every type of legislation that legislative drafters are instructed to draft and must be so reflected.

The only minor quibble with this book is that it fails to mention the impact of the U.S. Plain Writing Act of 2010 in its discussion of the role of plain language in legislative drafting. The discussion of plain language is very scant and does not necessarily reflect the current practice in the U.S. This law refers to drafting of subsidiary legislation (federal regulations) and will be helpful to drafters that are engaged in drafting this genre of legislative document.

Furthermore, the book fails or omits to mention the requirement to provide cost-benefit analysis or financial estimates as supporting documents when submitting legislative documents to the U.S. Congress. In the U.S, this is a mandatory requirement by virtue of Section 402 of the Congressional Budget Act of 1974 (2 U.S.C. 653) and requires the Director of the Congressional Budget Office to prepare a cost estimate for each bill or resolution that is reported by any House or Senate committee. I don't believe there is any other requirement for a cost-benefit analysis of federal legislation although cost-benefit analyses are required for certain types of federal rulemaking In the United Kingdom this has being the practice since the 1198/1999 Parliamentary Session, while in Nigeria this practice became mandatory by virtue of Order 77 (3) of the 2011 Standing Orders of the Senate of the National Assembly.

In conclusion, the author has bequeathed a legacy to the field of legislative drafting drawn from his half-century of employment at Office of the Legislative Counsel of the Senate of the Congress of the United States of America. I recommend this book unreservedly to all who wish to gain an understanding of the practice of legislative drafting within the U.S. Congress and beyond.

NOTES

1 Dickerson, Reed, *Book Review of Legislative Drafting: A New Approach by Dale, William McGill Law Journal*, 1979

2 Markman, Sandra, Legislative Drafting: Art, Science or Discipline? *Loophole-Journal of the Commonwealth Association of Legislative Counsel*, 2011

The aim of Clarity — *the organization — is "the use of good, clear language by the legal profession." With that in mind, what path would you like to see the journal take? Do you have an article you would like published? Can you recommend authors or potential guest editors? No organization or publication can survive for long if its members (or readers) are not gaining something of value. How can Clarity help you? Please contact editor-in-chief Julie Clement at clementj@cooley.edu with your suggestions and other comments.*

How to join Clarity *Complete the application form and send it with your subscription to your country representative listed on page 2. For the address, please see www.clarity-international.net/membership/wheretosend.htm.*

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. (Exception: our European representative prefers to be paid electronically. Please send her an email for details.) 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.

Annual subscription

Argentina ARS90
Australia AUD50
Bangladesh BDT1500
Brazil BRL50
Canada CAD40
Chile CLP30
Finland EUR35
Hong Kong HKD275
India INR1000
Israel NIS125
Italy EUR35
Japan JPY4000
Lesotho LSL100
Malaysia MYR95
Mexico MXN250
New Zealand NZD70
Nigeria NGN2500
Philippines PHP1500
Portugal EUR35
Singapore SGD55
Slovakia EUR700
South Africa ZAR100
Spain EUR35
Sweden SEK280
UK GBP20
USA USD35
Zimbabwe ZWD35

Other European countries EUR35
All other countries USD35

Honor roll of donors to Clarity Clarity is managed entirely by volunteers and is funded through membership fees and donations. We gratefully acknowledge those financial supporters who have contributed to Clarity's success:

$2,500+
Plain English Foundation
Anonymous (1)

$1,000+
Christopher Balmford
Joseph Kimble
Julie Clement

Plain 2017

Private businesses and governments can provide great service to their customers by using plain language. Many governments require the use of plain language in public documents, and a number of businesses are doing the same. It makes sense if your audience understands what you are trying to say to them.

Helping public and private sectors improve customer relationships will be the theme of the Plain Language Association International (PLAIN) conference September 21-23 in Graz, Austria. The host organization for PLAIN 2017 is Klarsprache, the Society for Readable Texts, which has been pioneering the use of plain language in Austria.

"For government and business organizations in Austria, PLAIN 2017 presents an ideal opportunity to find out how the rest of the world is reforming communication and how plain language can improve both customer services and the bottom line," says PLAIN President Dr. Neil James.

It's not only how you say it, but what it looks like, so the conference will have many sessions dealing with information design, usability, and other related disciplines. Both the use of technology as a tool that affects how information is presented, as well as the role of social media as a way to communicate, are likely to be addressed at the conference.

This will be PLAIN's eleventh conference since 1996. The last was in Dublin, Ireland, in 2015. Previous conferences were held in Canada, the United States, the Netherlands, Australia, and Sweden.

Having the conference in Graz also highlights the plain language work being done in the region.

"PLAIN is particularly excited to be holding its next conference in Austria, as this will help raise the profile of plain language in the German-speaking world," says Dr. James.

PLAIN partners with a local host organization to help with the myriad tasks required to produce an international conference. Klarsprache is excited to be the first Austrian host of PLAIN's conference.

"For Klarsprache, the PLAIN conference represents an opportunity to show how plain language improves government services and the relationships businesses have with their customers," says Klarsprache Professor Rudolf Muhr.

Another advantage, says Professor Muhr, is that "Graz is a university town, with a population of 300,000 and around 45,000 students in 6 universities. The university will be the ideal venue for international experts to share the latest research in clear communication with Austrian delegates and organizations."

"Like the previous 10 conferences, it will bring together the best plain language practitioners to share the latest developments in clear communication," says Dr. James.

At PLAIN 2017, conference attendees will share ideas, research, and expertise about the vital role of plain language in creating the trust, satisfaction, and loyalty of customers in private business and public administration sectors.

Inspiring keynote speakers and up to 70 contributors from more than 20 countries across five continents are expected at PLAIN 2017.

Please send in your presentation proposals before March 15. See http://www.plain2017.graz.org for the call for papers as well as other conference information.

Meet the Center for Plain Language

This fun lovin' group of communication pros Tweet, blog, grade, consult, support, award, and celebrate clear communication with government, business and nonprofits.

The Center is a non-profit that helps multiple sectors – financial, health, engineering, technology, legal/compliance, government – communicate clearly. And they have a vision:

CREATE A CULTURE OF CLARITY

Every audience | Every format | Every time

Catchy, right? It's also inclusive. That's because clear communications works across disciplines. Center members include top professionals from across the country in these specialties:

- Accessibility
- Branding
- Communications
- Design
- Information technology
- Marketing
- Search engine optimization
- User experience
- Writing and editing

For almost 15 years, the Center has educated Congress on the importance of plain language, which led to the passage of the Plain Writing Act of 2010.

The Center is supported by generous members and corporate sponsors. Members enjoy perks like discounts on workshops and a free copy of the Center's eBook, "Clear Communications With Clear Results: How to start a plain language program where you work."

THE CENTER HOSTS AWARDS

Picture the glamour of the Oscars, the thrill of the Emmy's, and the surprise of the Tony's and you'll get a feel for the Center's ClearMark Awards. Each year they recognize the best in clear communication. The 2017 awards are on May 9 at the National Press Club in Washington, DC.

Winners often mention the prestige the award brings to their work and ongoing efforts. Recently, the Center was able to open the competition to Spanish language entries.

DELIVERS WORKSHOPS

Sign up today for "Data's Not Dull! It Tells a Great Story" with the author of The Wall Street Journal Guide to Information Graphics. Learn how to turn data into a compelling story, use graphics effectively, and avoid common pitfalls. The workshop precedes the ClearMarks on May 9.

The Center also hosts webinars and delivers in-person presentations and workshops.

GRADES UNCLE SAM

The Center evaluates how well federal agencies comply with the Plain Writing Act of 2010. Agencies can get marks from A+ to F. And just like a good teacher, the Center shares guidance and an encouraging nudge for how to improve.

The agencies work hard to improve their grades year over year. The review uses a combination of software metrics and expert judges to determine the final score.

MEET THE BOARD

Susan Kleimann, Center Chair, and President, Kleimann Communication Group

Karen Baker, Center Vice Chair, and former Senior Vice President, Consumer Experience, Healthwise

Julie Clement, Center Treasurer, and Principal, J Clement Communications

Rebecca Askew, CEO, Circuit Media

Brian Berkenstock, Content Strategist, Aetna

Deborah Bosley, Principal, The Plain Language Group

Christopher "Chip" Crane, CEO, CPoint Consulting

Jeff Greer, Associate Director, Content Strategy, MRM//McCann

Joanne Locke, Principal, J. Locke Plain Language Consulting

Jennifer Pearce, Founder, Plain Language Health

William Ryan, Supervisory Program Manager at Transportation Security Administration, Office of the Administrator

Meghan Codd Walker, Principal, Zuula Consulting

Executive Director: Andrea "Deedee" Moxley, Associate Director, Multicultural Resources at The American Speech-Language-Hearing Association

Deputy Executive Director: Amy Hasselkus, Adjunct Instructor, Health Communicator and Speech-Language Pathologist

THE CENTER WELCOMES MEMBERS AND VOLUNTEERS

Learn more online. (A team of dedicated volunteers created the eBook.)

CONNECTS YOU WITH HELP

Visit the Center online to see the robust consultants list. Consultants help organizations with the following:

- Plain language writing
- Information design
- Training
- Content testing
- Talks and keynotes
- Plain language program development (and organizational change) strategy

To learn more, visit us at www.centerforplainlanguage.org.

Advertising rates
Contact Julie Clement,
clarityeditorinchief@gmail.com

Clarity Journal is published twice a year.

Submissions We encourage you to submit articles to be considered for publication in Clarity. Send submissions directly to editor in chief Julie Clement. Please limit submissions to approximately 1,500 or 3,000 words.

Improving customer relationships

11th International Conference – Plain Language Association International (PLAIN)
Graz, Austria, September 21–23, 2017

Hosted by

KLARSPRACHE.AT
GESELLSCHAFT ZUR FÖRDERUNG LESBARER TEXTE

Klarsprache.at-Gesellschaft für lesbare Texte/Clear language.at – Society for readable texts

Our conference theme is “Improving Customer Relationships”. Our conference will help you share ideas, research, and know-how about the vital role of plain language in creating the trust, satisfaction and loyalty of customers in private businesses and public administration.

Deadline for presentation submissions is March 15.

Conference website:
http://plainlanguagenetwork.org/plain-conferences/

What's plain language?

A communication is in plain language if its language, structure, and design are so clear that the intended audience can find what they need, understand what they find, and use that information.

Now more than ever, we need clear communication.

Join us **www.centerforplainlanguage.org**

Center for Plain Language

CENTER FOR PLAIN LANGUAGE
21 EAST MAIN STREET, RICHMOND, VA 23219

Annual ClearMark Awards – May 9, 2017 | **Dona Wong Workshop** - May 9, 2017 | **David Berman Webinar** - June 14, 2017 | **Federal Report Cards** – Fall 2017 | **Newsletter** – bi-monthly
Board elections – May 2017 | **Consultant List** – always open | **Clear Communication for Clear Results:** How to start a plain language program where you work - our ebook