

# Clarity

Number 66

November 2011

Journal of the  
international association  
promoting plain legal language

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## In this issue

Ann Blücker <i>The role of plain language in the writing training of law students</i>	5
Howard Warner <i>Public power: putting the case for the lay reader</i>	8
Cheryl Stephens <i>Working with lawyers on your projects</i>	11
Mariana Bozetti <i>The design and implementation of a plain Spanish writing-skills programme for Argentina's leading law firm</i>	14
Justice John I. Laskin <i>Teaching judgment writing in Canada</i>	17
John L. Geiger <i>A most dangerous clause: Plain language prevents legal malpractice in software licensing</i>	20
Rachel L. Jones <i>Nova Scotia regulations drafting: a collaboration that works well</i>	23
Caroline Lindberg (with editing by Kim McCutcheon) <i>Developing legal rights information: Collaborating with external legal advisors</i>	27
Tania McAnearney <i>A 'four minds' approach to editing creates clarity</i>	30
<b>Clarity and general news</b>	
This issue	3
How to join Clarity	10
Contributing to the journal	26
Member and other news and events	26
Linguistic Lingo for Lawyers	32
Conference News	34
Message from the President	35

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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, one anonymous donor, Christopher Balmford

\$1,000+ Joseph Kimble, Julie Clement

\$500+ Nicole Fernbach

\$100+ None



An international association  
promoting plain legal language

[www.clarity-international.net](http://www.clarity-international.net)

## Clarity ... the journal

Published in May and November

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## **This issue**

I volunteered to guest edit this issue out of naked self interest. I'm a clear language consultant with an honours degree in English and Sociology, a lifetime of experience as a professional editor, and no legal training at all. I have always felt intimidated by the argument that my clear editing might run afoul of the law in some obscure but dangerous way, causing harm to my clients.

A year ago, this quandary generated some lively discussion on the PLAIN list. I decided to focus this issue on the lawyer/non-lawyer interface in the plain language field. I guess what I really wanted to know was, what's the way forward? Here's what I learned from our nine wonderful contributors:

From *Ann Blücker* I learned that even in our revered Sweden, first-year students are taught to approach the law as an alien language. *Howard Warner* did a good job of articulating the frustration that many of us feel about the intractability of legal language. *Cheryl Stephens* taught me a lot about the "lawyerly persona"—definitely not my personality type!

That's the struggle, but so much of what I learned did point to a way forward—for both the legal and the plain language professions. *Mariana Bozetti*, a university-level writing teacher, talks about the clear Spanish program she helped to develop at one of Argentina's largest law firms. Justice *John Laskin* describes how he recruited faculty from Canadian colleges and universities to teach judgment writing. Virtually every federally appointed judge in Canada has taken the course, and it has become an international model.

*John Geiger*, an attorney who acts expressly as a plain language consultant on contract negotiation teams, shows how this collaborative model can mitigate risk. At the Nova Scotia Department of Justice, Registrar *Rachel Jones* heads up an office where plain language editors and

regulations drafters work together with shared purpose and mutual respect. At Community Legal Education Ontario, *Caroline Lindberg* describes a collaborative model between legal and language experts. In New Zealand, *Tania McAnearney* works with a 'four minds' approach for large legal projects. The team includes the client, an editor with both legal and language training, a professional copy editor with a plain language approach, and users for testing.

We plain language professionals can't all be lawyers. We don't necessarily have to be, as long as we work collaboratively. Those of us who work as external consultants would greatly benefit from specialized training to help us in our inevitable brushes with the client's legal department. My hope is that we will see courses like that emerge as we move toward accreditation in the plain language field.

Lawyers and judges can't all be plain language experts either. But an awareness of the duty to communicate and the techniques it requires should be instilled in the profession, from the first day of law school onward.

The sooner we can make both of those things happen, the smoother the path to collaboration will be.

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**Sally McBeth** manages *Clear Language and Design (CLAD)* in Toronto, Canada. The *Canadian Centre for Professional Legal Education* uses CLAD's website as classroom resource for bar admission students.



## Join us in Washington, DC!

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# The role of plain language in the writing training of law students

**Ann Blücker**

*Uppsala University, Department of Scandinavian Languages*

In my dissertation<sup>1</sup> I present a study of how new law students at Uppsala University are trained in the use of legal language. The students are enrolled in a 4.5 year programme. They do not need prerequisites, and about half of them have not studied at university before.

My study focuses on the language norms and ideals law students encounter. My core material consists of the teachers' written comments on the students' texts during the first year of the programme. By means of observations, surveys and interviews, I have documented language advice that the teachers provided in different types of instruction and the students' view on writing training.

## **Belonging and alienation**

When the students get their first graded writing assignment back, some teachers point out that legal Swedish is an entirely new language. I can imagine that these new law students listen with great interest to this message. They are putting on new, unaccustomed, linguistic attire.

This can be perceived as something desirable. They are starting an education that is highly sought-after. The situation can also be alienating. I heard one student say, "Some of the other students start talking legalese at once, but I don't understand anything."

That feeling of distance can be reinforced by the school. As a part of the teaching of legal method, there sometimes arises a picture of a very special lawyers' guild. "Lawyers speak a language that is alien to non-lawyers," states one handbook on method.<sup>2</sup>

The teachers' intention is probably to help the students understand the new context. From a plain legal language perspective, the condi-

tions and norms that the law teachers convey to the students are very important, particularly at the beginning of law school, when the students search for clues to what legal studies are all about.

The view that legal language is a new language can exaggerate the distance between lawyers and non-lawyers. In a questionnaire, I asked third-year students whether they had received some training in responding to the needs of different reader categories and of a lay audience. In their answers, two students showed a noteworthy attitude:

Didn't happen. I just want other lawyers to understand what I write.

Has not occurred. Everyone can write for non-lawyers, nothing that we need to practice in the course.

I think the first answer should not be interpreted to mean the student wants only lawyers to understand his texts. But it shows that his focus is on the members of the guild he is to enter. It seems as if he is struggling to achieve what he has imagined to be the appropriate legal style and content.

The second answer shows a narrow conception of what it means to write for non-lawyers. Formulating legal content that can be understood by different readers is definitely not an easy task. This student had been in law school for nearly three years. Apparently she has not acquired much of a meta-perspective on the language use of the legal profession in relation to people and needs outside the profession. I think that this shows a deficiency in her education. Law school training often points out that legal matters are difficult and can be fully understood only by lawyers. The students ought to be constantly reminded that legal texts and matters deal in the main with the affairs of non-lawyers.

## How students understand “good” legal writing

A style guide that law students in Sweden are encouraged to follow presents writing simply as a goal of legal Swedish.<sup>3</sup> Based on this ideal, the aim of the teachers is to mark wording that is convoluted, wooden or archaic. Another aspect of the language ideal concerns violations of conventional language rules, rules that educated older people learned in elementary or grammar school. These norms for general written language here become a fundamental part of the legal language practice.

When students summarized what they had learned about writing during the first semester, they expressed a mixture of the importance of accuracy in thinking, the ideal of writing simply, and detailed linguistic norms:

Be more careful with the small details of language. Learn the importance of thinking really carefully when formulating a sentence.

I have learned and developed a great deal. I have learned to write clearly and simply and not to have as many pronoun reference errors.

The latter student has understood that she is required to write simply, but along with that stands the benchmark of precision: Always strive for precision in pronoun reference!

Precision also means dealing with formalities in the conventional way. New students can be so preoccupied with formalities that this aspect conceals more important facets of legal writing. One first-year student, who had already graduated from another university programme, revealed that what she has learned about the use of legal language is not very profound:

How one should deal with footnotes and the formal conventions of writing in this department. Other than that, I have only become more confused.

In a handbook for new law students the importance of writing without any errors is stressed: “The goal of correctness for you as a writer of memos is definitely realistic.”<sup>4</sup> In an e-mail, one of the teachers in my study underscored this, describing a legal language culture in which the standard is texts without errors:

Lawyers are formalists, in some respects. If a text contains noticeable spelling errors, only a few, it is typically perceived as less important what it actually contains—it can be categorically dismissed, is not worth taking seriously. To use the wrong word, to take another example, is to be incompetent.

Precision is a main norm in the law teachers’ comments on the students’ texts, whether the marking refers to rules for general written language, to norms for an academic logical style or to norms that are specific to the legal use of language—for example, the correct professional vocabulary, or how legal sources are to be denominated.

### Precision vs. plainness

Of course precision contributes to quality in a student’s text. But, as Joseph Kimble has pointed out in his essay on the myths about plain language, the concept of precision is often used to argue against plain legal language:

*Myth Four:* Plain English is impossible because the law deals with complicated ideas that require great precision.<sup>5</sup>

In the striving for precision, the good must not be the enemy of the best. Like Joseph Kimble, I am convinced that plain-language principles usually can make even complicated ideas more clear.

The teachers’ written comments that I gathered for my dissertation frequently concern themselves with word choice and style. The teachers mark expressions that they think “fit the legal tone poorly” in different ways. “The legal tone” is hard to describe, and the risk is that the students, in their search for the correct legal tone, rely on the conventional style that they find in the course material, in jurisprudence, and in old cases. They suspect that what really counts in law school is established traditions—and therewith legalese.

Quite often, the sentence structure in the students’ texts deviates from the ideal of writing simply and clearly. Convoluted sentences can be caused by a lack of ability or an attempt to imitate a legal style. The teachers’ comments on sentence structure may imply a kind of double message to the students. In the course literature, students often encounter complex sentence structure. One student, whose teacher had told him to avoid dependent

clauses, expressed his need for a functional language:

But I write dependent clauses when I want to clarify.

The student's reaction shows how important it is to involve the students in a learning process—to help them analyse and problematize what writing simply means in practice.

To facilitate a plain-language orientation in law schools, both students and teachers need a deeper knowledge of the similarities and differences between language use in legal settings and other types of factual prose and public language. Co-operation between lawyers and linguists is needed in that knowledge-building process, as well as in striving for a plain legal language culture.

The gap between legal and non-legal language use that the students may perceive can be reduced if more emphasis is given to the qualities that the students already can find in their own language. Language socialization must not work in the way that this first-year student has encountered:

When you think that something is good, you can instinctively expect to get it slammed.

From the students' point of view, legal language can be perceived as something new, but there is a danger in presenting legal language as a "new language" to first-year law students. It can legitimize a language that is dense and verbose and a language use in which it is the reader's responsibility to understand the text, not the writer's responsibility to make the text clear. Law students may be learning a new, subject-specific vocabulary and a new method for reaching conclusions, but also they must see that the criteria for a well-functioning legal language are much the same as for many other types of language use.

One of the law teachers in my study introduced me to a saying from German lawyers:

Two things get better with age, lawyers and Persian rugs.

From a plain-language perspective, we can hope that this saying implies that lawyers will have the wisdom and the courage to lift the fog of legalese. But it is no simple thing to change a culture. The language socialization

of law students is just a part of their socialization into the larger legal culture. One of their handbooks encourages them to "let themselves be socialized, let themselves—so to speak—sink into the layers of the legal culture."<sup>6</sup> The authors borrow a voice from the Star Trek Universe, whose message they perhaps mean summarizes the mechanisms of the language socialization of law students:

You will be assimilated. Resistance is futile.

— The Borg Collective

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## Endnotes

- <sup>1</sup> Blücker, Ann, 2010: *Juridiska—ett nytt språk? En studie av juridikstudenters språkliga inskolning* [Legalese—a new language? A study of the language socialization of law students]. Diss. Uppsala University, Department of Scandinavian Languages
- <sup>2</sup> Melander, Jan & Samuelsson, Joel, 2003: *Tolkning och tillämpning* [Interpretation and application]. 2 ed. Uppsala: Iustus, p. 193
- <sup>3</sup> Jensen, Ulf, Rylander, Staffan & Lindblom, Per Henrik, 2006: *Att skriva juridik. Regler och råd* [Writing Law. Rules and advice]. 4 ed. Uppsala: Iustus
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- <sup>5</sup> Kimble, Joseph, 2006: *Lifting the fog of legalese. Essays on plain language*. Durham: Carolina Academic Press, p. 11
- <sup>6</sup> Melander and Samuelsson, p. 194

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Previously she has worked with language cultivation at the Language Council of Sweden and as a teacher of Swedish.

Her doctoral thesis deals with the language socialization of law students. Her research interests are discourse analysis, linguistic norms, writing within educational and public contexts, and legal language.



# Public power: putting the case for the lay reader

## Howard Warner

*Plain English People, New Zealand*

When a lawyer drafts a legal document, the 'bottom line' is whether it will hold up in court. So lawyers write with other lawyers in mind.

In reality, most legal documents are for the benefit of laypeople—framing their rights and obligations so they can conduct their business safely and effectively. Obviously, they need to be able to read and understand those documents.

But how much do lawyers really care? And do they have the skill to transform these documents into crisp, modern, reader-focussed communications anyway? Or are they too close to the content, too mired in their age-old conventions?

Maybe it's time they looked outside the profession for help in communicating with the public.

## Unlettered in matters of law

Let me nail my colours to the mast. I am not of the profession. I have never drafted a brief or constructed a contract. I'm one of the hoi-polloi, the public—an ordinary consumer of law.

As a professional plain-English practitioner, I work with providers of specialist information, including lawyers. But I consider the lay audiences of those specialists to be my 'electorate', the people I truly represent.

I've noticed how the legal profession describes itself in exalted terms, capitalising such terms as bench, judge, court, contract and crown, even when used generically. So for this article, since I'm putting the case for the lay reader, I plan to turn the tables. I shall exalt with capitals only those worthy institutions I represent: the Customer, the Public, the Punters, the Lay Reader.

## How Ordinary Folk view legal docs

Ordinary Folk like me have contact with the law almost daily, especially in written form. We may deal with a will or trust deed very rarely. But most days we'll view an email or website with a disclaimer; refer to a sales or employment contract; receive a parking ticket or some other regulatory notice.

We come from all points on the reading-skills spectrum. But when it comes to legal documents, there are a few maxims we can take as read:

- The longer the document, the less we read.
- The smaller the type, the harder it is to focus.
- The denser the text, the less we understand.
- The more elevated the language, the less we're inclined to question.

We seldom feel part of the legal-document process—even though it is supposedly for our benefit, and we're the ones paying for it.

In employment, you're presented with a contract—you either sign or someone else gets the job. In a property deal, lawyers and real-estate agents supply the contracts—you don't bring your own. And in any online commercial transactions (booking a flight, buying a product, signing up to a subscription or membership), you cannot move on to the next step until you have declared that you 'read and understood' those 25 pages of small-print mumbo-jumbo. Most people just sign and hope.

## Barriers to readability

So why can't the Public read legal documents as easily as lawyers can?

It's not just the archaic words, the *wherewithals* and *aforementioned*s and *hereintos*. Nor the jargon and redundancies (*pursuant to*, *malfeasance*, *cease and desist*). Nor the prevalence of Latin expressions in an age when pupils are more likely to study Russian or Mandarin or Maori.



Nor the capitalised words, bracketed definitions, repetitions, references and all other devices that clutter up the text.

It's the sheer volume of text: the sentences that are too long to digest, too complex to unravel; the headings that are almost as long as sentences; the intricate, multi-layered numbering systems; the mass accretions of qualifications delaying the all-important sentence subject.

### **What the Lay Reader really wants**

By contrast, all the Lay Reader needs is:

- the information in a logical order, so they can find things easily
- words they recognise
- enough full-stops (periods) so they can pause and process what's just been said
- direct, clear subjects and verbs, and a logical sentence order
- a tone that makes them feel included
- a typography that helps them focus.

What they don't want is a document they have to take back to their lawyer—or another lawyer—for translation, probably at substantial extra cost.

### **Behind the lawyer-speak**

Why are legal documents written in this Reader-unfriendly way? Ask a lawyer and they'll say: to make sure everything is watertight when it's challenged in court, or because they've always done it this way.

Bryan Garner, in *Legal Writing in Plain English*, talks of the "age-old cycle of poor legal writing" that lawyers will never break until they're ready to change their thinking. And the "non-sense baggage they carry around" about what is right and wrong. And their "ill-founded fear of being simple and, by implication, simple-minded—or perhaps seeming to lack sophistication."

Adam Freedman, in a recent Wall Street Journal article, refers to lawyers trying to "dazzle their audience" and "put their erudition on display."

An even more cynical view is that lawyers use language to protect their professional mystique, to preserve the distance between themselves and the Hoi-polloi.

### **Stumbling blocks to progress**

But the problem goes deeper. Throughout the world, lawyers base much of their work on legislation that is archaic, overblown and obtuse—certainly beyond the understanding of your average intelligent Lay Person.

But the biggest stumbling block to the Public being able to access the law is the lack of any formal communication channel. We've got no way of telling lawyers what we want, and they aren't rushing to ask.

In my native New Zealand, we've had a high-powered team working behind the scenes to review all our legislation, supposedly for the public's benefit. And the Parliamentary Counsel Office, which manages our legislative drafting, has been working to a plain English policy for the past decade. Mind you, the legislative review team is all legal luminaries and academics, and the Parliamentary Counsel Office developed its policy internally, without public input.

Another stumbling block is the way lawyers keep everything 'in house' instead of using consultants for specialist tasks. Lawyers often fallaciously see plain English editing as a legal task, if they recognise it at all. Our firm was once approached by a solicitor wanting to learn how to edit, so she could offer her clients an additional service of interpreting those tired old templates she'd been foisting on them. We advised her to hire real editors at her own cost, and use the fresh, modern, reader-friendly templates as a marketing point of difference. But the point was lost on her.

### **How external editors can help**

It must be immensely hard for lawyers to cede any part of a craft they have always owned. They worry that an editor untrained in law will change their meaning and intent. But editors are professionals too. They are trained to enhance text through manipulation of syntax, word usage, grammar, structure and visual presentation. They are skilled at tidying up text—in the interests of consistency and professionalism—through the fine shadings of punctuation, grammar, style and formatting. And they can do all of this without affecting any content.

Plain language editors take it a step further. They are specialists in matching language and

presentation to lay readerships—people with less understanding of the subject, less familiarity with specialist documents, even lesser reading ability (though not necessarily).

My business was engaged to edit a decades-old trust-deed template for a law firm. The partner told us she was tired of trying to explain it verbally to clients, doing little more than repeating the words, but giving up half-way through because she was just as confused and bored as they were.

### Dinosaur alert

These are changing times. Traditionally sheltered industries, such as law, are facing competition from unexpected quarters. The Public is demanding greater accountability, through enforceable standards. Consumers are standing up for their rights.

The business of law is less secure than ever before. I see this in recent marketing efforts by some law firms, where previously the status of their profession spoke for itself.

Unless lawyers start communicating with the Public on their level, in their language, they risk becoming the dinosaurs of the information age. The whole industry—not just a few enlightened individuals—would have to undergo a major shift in attitude towards the public.

There are some obvious steps they can take:

- Rip up all those fusty old templates and start again.
- Use plain English editors.
- Take advice (even training) from external writing specialists—rather than just other legal types who perpetuate the same conventions.
- Try user-testing.

If lawyers were to move in this direction, then the bureaucrats and others who worship at the temple of legalese would follow, I suspect.

Australian plain legal-language expert Dr Robert Eagleson, in a recent conference paper, urged his colleagues: “We must be more flexible than ... in the past, more prepared to break with tradition, always open to the expectations of our readers and disposed to select an arrangement that is congenial for them.”

I’d put it more bluntly, on behalf of ‘my’ constituency: “The Customer is always right. The Customer pays your bills. The Customer needs to understand. So keep us happy and talk to us, in our language—whatever that takes.”

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*Howard Warner is executive director of Plain English People, based in Auckland, New Zealand. He has been editing all kinds of public documents, from a wide range of sectors, for the past 20-odd years. He also trains government and private-sector groups to write clearly and effectively.*



### How to join Clarity

The easiest way to join Clarity is to visit <http://sites.google.com/site/legalclarity/>, complete an application, and submit it with your payment. You may use PayPal or a credit card to pay.

Prospective members in Canada, Italy, and the United States may also pay by bank draft. If you prefer to submit a hard copy of the application, you may contact your country representative for submission instructions. Country reps are listed on page 2.

# Working with lawyers on your projects

## Cheryl Stephens

Plain language consultant, Vancouver, Canada

As a plain language professional, you may have complained, “The lawyers wouldn’t let us.” As a former lawyer, and after 20 year as a plain language consultant, I hope to help you become more successful in your dealings with lawyers.

I will cover three topics:

1. What you need to know about lawyers’ work
2. What we know about the lawyerly *persona*
3. Ways to work more effectively with lawyers

### 1. What you need to know about lawyers’ work

Traditionally, the legal profession distinguishes documents that are part of daily life—correspondence, memos, and reports—from those that recognize rights and impose obligations.

Producing the latter is called *legal drafting*. There is some debate about whether the verb *to draft* originates from solicitors seeing themselves as *draftsmen*, who draw up documents, or as professionals, who present preliminary drafts for client review. Lawyers use the word with both meanings.

Lawyers draft two kinds of documents that deal formally with rights, obligations, and benefits.

- The first kind are legal documents that record dealings between two or more people. Examples are contracts, deeds, and incorporation papers. These have acquired traditional wording and grammar.
- The second kind includes laws and regulations. This is called *legislative drafting* and has its own rules.

The heart of your frustrations with lawyers may revolve around this simple fact: they are as attached to words and the rules of writing as you are.

### 2. What research says about the lawyerly *persona*

There is a lawyerly persona, like the personas we use in design, marketing, or usability to guide our decisions. We can also use the lawyerly persona to understand and better communicate with the lawyers we work with.

Since the 1960s, law students and lawyers have been tested with many tools. In fact one tool, the Meyers-Briggs Typology Index, was developed to help a pair of psychologists understand the temperament and behavior of a lawyer who married into their family!<sup>1</sup>

Lawyer personalities differ from the general population. It is not settled whether law schooling or the practice of law changes personalities, or that people with certain personalities choose the law. As students, future lawyers are already internally insecure, awkward, and anxious.<sup>2</sup>

While lawyers are different from the rest of us, they are similar to each other in important ways. I will not discuss the 10 – 20% who differ markedly from the typical lawyer.

#### Specifics of the lawyerly persona

Pessimism is the most common trait of lawyers. It serves them in their careers but is not helpful in dealing with people.<sup>3</sup> Faced with conflict, the lawyerly persona will either avoid dealing with it or prepare for battle.

Our lawyerly persona (LP for short) is skeptical by nature and wants to see facts that can be verified by a reliable source. The LP insists on logical, unemotional analysis of problems, but wants matters brought to a quick conclusion due to their sense of constant, high urgency.

**The LP hates** disorganized situations, lack of planning, and inefficiencies. The LP **gets upset by surprises** or big or frequent changes.

While clinging to ageless customs, lawyers draw on the lessons of history, hindsight, and experience to deal with the *here and now*. The LP sees justice in defined and expected outcomes, not as an abstract ideal.

### 3. Ways to work more effectively with lawyers

With your client's permission, involve the lawyer in the process early. Agree at the start on a protocol of communication between you. If you have a liaison at the client office, ask if they want to be copied on communication with the law office.

#### Create a work plan

Lawyers need detail and a clear picture of goals and objectives. They crave structure.

When faced with making a quick decision, they are most likely to give you a "no" answer. Show them there will be time for careful consideration. Remember that lawyers like schedules, closure on decisions, planning, follow through, and a "cut-to-the-chase" approach.

You can build trust by creating a work plan and abiding by it. This can reduce the lawyer's perception of risk in your collaboration.

- Make a plan that starts at "A" and ends at "Z."
- Move through the plan one step at a time; no skipping around.
- Make each part and piece definite and separate, even measurable.
- Pay attention to detail or explain any deviation.
- Stick to deadlines; be clear that you expect the lawyer to do the same.

#### Feed into the lawyerly desire for critical analysis

Lawyers are less likely to see the positive and would be uncomfortable expressing it if they did. They are primed to criticize and not to see the benefits of change involving risk.

Do not expect a lawyer to praise your plain language revision. Be prepared to face their

skepticism, pessimism, and cynicism. Appeal to the lawyer's competitive nature by suggesting that other lawyers are adopting plain language, or that clients are increasingly demanding it. Or, in some cases, point out that the law requires it!

#### Show respect for the legalities

Treat the lawyer like as you would a subject-matter expert. I have found it wise to ask lawyers for a memorandum on the law involved. By starting with their own report on the law, we avoided arguments over legal interpretations.

You have to emphasize that (usually) your role is to write for the client, or the public, so they can understand the law in general application, not to take it as personal legal advice. Make it clear this is not an experiment but an economic or market imperative facing the client. Lawyers are ambitious; use it against them. They'll want to be on the cutting edge.

If persuasion is needed:

- Provide the lawyer with examples of plain language. Show models of similar types of legal documents in plain language.
- Emphasize that clarity increases precision. Provide reading materials.
- Do all you can to overcome the lawyer's instinctive conservatism and risk-averse nature. If necessary to concede on a particular word, try to provide an in-text definition.

Respond to the argument that the language is approved by the courts. Remind them that if the legal language was so clearly drawn, it would not be litigated. And the truth is that it is seldom the choice of words that is the crux of a court decision.

On contentious issues, go to the law library to check several of the books described as compendia on legal words and phrases. You will find support for the idea that the words in question are not settled in meaning.

#### Accept the lack of rapport

A lawyer's cold reserve, and lack of interpersonal connection with you, is about the lawyer, and the fact that law firms value technical competence over emotional intelligence—it is not about you!

Recruit intermediaries. Ask the lawyer if you can deal directly with her legal assistant or secretary for most communication. Legal secretaries are more likely to have better people skills and they'll serve as a buffer of high emotion.

How to deal with this:

- Draw the lawyer out; think of the lawyer as a shy flower!
- Be aware that lawyers hear things literally.
- Accept that they do not brainstorm.
- Give them time to think by sending your suggestions to them in writing.
- Expect a certain degree of aggressiveness from the lawyer; don't rise to the challenge or you'll be drawn into their game.

### Be flexible yet cogent

Lawyers prefer to look for a "leverage point" that will fix the problem with the least damage to the original. The lawyerly persona places a high value on minimizing both effort and risk.

The law tradition considers certain words sacrosanct. That is because the law was once memorized word-for-word, to be passed down through the generations. Nowadays, lawyers want to find just the right word—never mind that the original document is not right or concise!

How to deal with this:

- Set out the pros and cons of wordings and ambiguities.
- Offer alternative wordings and be prepared to negotiate them.
- Satisfy the lust for a cost-benefit analysis—emphasize the risk of keeping the legalese intact.

### As a last resort...

Try using a plain language summary as a cover page for a longer document. I had to do this once.

My client was a funding agency that needed to receive periodic progress and financial reports from its clients. The clients could not understand the four-page contract and repeatedly failed to file reports. Working with a law firm, we wrote a new contract in plain language. The lawyers decided the contract terms

were insufficient so they added about five pages of information. Paragraph by paragraph, we had to negotiate the wording. Ultimately, we agreed on a two-page summary of terms. Using this summary, the clients were able to understand their reporting duties and comply with them. The summary included a disclaimer that in case of a conflict, the terms of the contract overrode the description in the summary.

Although the result satisfied the agency's purpose, it was frustrating to me that the final document was so long and needed an executive summary.

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### Endnotes

- <sup>1</sup> Center for Applications for Psychological Type, "The Story of Isabel Briggs Myers", <http://www.capt.org/mbti-assessment/isabel-myers.htm>
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**Cheryl Stephens, BA (Hons), JD**, has devoted 23 years of her life to promoting plain language, founding Plain Language Association InterNational, creating Plain Train and PlainLanguage.com. She has written 4 books available at PlainLanguageWizardry.com. Cheryl now manages the Plain Language Advocates group on LinkedIn. A detour led to the study of personal coaching for lawyers.



# The design and implementation of a plain Spanish writing-skills programme for Argentina's leading law firm<sup>1</sup>

**Mariana Bozetti**

*Marval, O'Farrell & Mairal, Buenos Aires, Argentina*

*This paper describes the practical and theoretical aspects of a long-term, in-house programme in plain Spanish carried out in a law firm in Buenos Aires, Argentina.*

## **Beginnings**

Since 1998, I have been teaching plain writing in Spanish at Marval, O'Farrell & Mairal, one of Argentina's largest law firms. Founded in 1923, it has over 300 lawyers who work in all areas of the Law.

In 1997, Marval, O'Farrell & Mairal hired a writer, Pedro Mairal, to give individual classes in improving writing skills for any interested lawyer. Initially, this was simply one more perk that the law firm offered. The aim of this course was to provide the lawyers with a better skill set when it came to writing to enable them to write more clearly and concisely. This individual "improvement" turned out to be so successful that the following year, the law firm decided to implement systematic group training. At this point Pedro Mairal invited me to share his workload. I taught and still teach academic writing at the Torcuato Di Tella University, so had experience in writing itself as well as dealing with the process of turning ideas into words. I also had technical background in teaching writing skills to those who are 'supposed' to already know how to write, which is the case for both University students and lawyers.

When it came to designing the first group course, we could find no other similar project in Argentina, nor could we find a bibliography on the subject. So we turned to classical rhetoric, and two of the most important authors in English on the topic, Martin Cutts<sup>2</sup> and Richard Wydick<sup>3</sup>, as well as a Catalan author, Daniel Cassany, a professor at the

Universidad Pompeu Fabra, in particular his book *La cocina de la escritura*.<sup>4</sup> Cassany is a pioneer in spreading the principles of language clarification that come from the Anglo-Saxon tradition to the Hispanic world. We also included aspects of cognitive science's influence on writing, such as works by Hayes and Flower<sup>5</sup> and Bereiter and Scardamalia<sup>6</sup> These were the sources used to design an eight-part course which covered clarification of texts and focused on writing as a process, consisting of brainstorming, planning, writing and revision. The course also included one class dedicated specifically to punctuation, as a basic tool for any writer wishing to have dominion over their words.

This first course was extremely ambitious: each class plan included theory and practice, based on working documents from Marval. All exercises had a possible solution, which, as well as providing a template, also encouraged participants to work on their own process of clarification.

The first group course was aimed at lawyers of all levels in the firm, from partners to interns. We also set up a consultation helpline on e-mail and on the telephone and included a service to revise texts on request. The objective has always been not to proofread, but to analyze the text with the author once it has been revised, in order to illustrate to the author which points were obscure.

In 2002, we started to publish a bulletin, *R&W*, on a monthly basis, in collaboration with Joanna Richardson, who teaches plain English at the firm. The bulletin includes quotes from famous authors and specialists on the guiding principles of our work: clarity, concision and simplicity. We also analyze common errors in writing and any recent queries.

At this point I should point out that the course is optional, hence the need to raise awareness of the advantages of plain style.

## Foundations

The theoretical framework behind our work is based on the sources mentioned above, namely studies of readability and legibility, which are closely linked to classical rhetoric. Thus, both discourse analysis and textual linguistics allowed us to refine our training program. For example, the concept of discursive genre by the Russian linguist Mijaíl Bajtín<sup>7</sup> was a breakthrough in the field to make the step from micro to macro text. Bajtín proposes an analysis of communication within specific groups of people. He focuses on discourse as social practice. This is particularly applicable to legal language, as it allows us to analyze the distinguishing features of a particular type of legal writing and work on simplifying the document's design.

From the French perspective, *la théorie de l'énonciation*, the concept of speaker and listener enables us to address problems in depth that used to be simply put under the label of "keeping the reader in mind". Thus, the lawyer finds it easier to understand that if they use irony to excess, they are constructing a speaker who is overly present, who draws attention to themselves, instead of basing their argument on facts and proof; and that ultimately, this weakens their argument. Textual linguistics, with its concept of text (or discourse) as a complex and multi-layered object, allows for an exhaustive analysis of texts and allow us to classify exactly where the nuclei of obscurity lie.

The program design and training have been my sole responsibility since 2008.

### **Centro de Escritura (Writing Centre)**

As of 2010, Marval, O'Farrell & Mairal named the Writing Centre as a stand-alone department within the firm's organizational framework. Although for the moment I am the only consultant, the Writing Centre hopes to incorporate new advisors in the future. The centre develops the following areas of writing: clarification of style, training in plain writing-skills, writing for specific purposes, proofreading and editing, document design and query-answering. This centre is a model that may be replicated within any institution to implement plain language programmes.

## The programme: five courses

Today, the plain Spanish training program is given in five courses throughout the year: Writing Skills I, Writing Skills II, Punctuation for lawyers, Writing e-mails and Writing legal texts. Each course has its own manual. The consulting service continues, as does revision of texts and the opportunity to consult on specific queries that crop up while writing. The monthly bulletin continues to publish queries and common errors in writing.

### **Writing Skills I**

Writing Skills I introduces the concept and centres on the micro text—on the simplification of words (lexis) and syntax, the sentence and the paragraph. Then the concept of discourse genre is introduced, which allows us to make the jump to macro text and to the first division of genre, destined for either judges and lawyers or laypeople. This course finishes by showing precisely where the texts have nuclei of obscurity and how this alters readers' understanding. It is divided into eight parts, each an hour and a half long.

### **Writing Skills II**

Writing Skills II may only be taken after the first course. Although it continues to work on clarification of style, the emphasis is placed on the macro text and on the analysis and writing of four genres, which are frequently used in Marval: memo, contract, provisional offer letter and confidentiality agreement. Participants write within these genres and also analyze their own work as well as their peers' in class. Topics also include reader-friendly layout and document design. The course is divided into six parts, each an hour and a half long.

### **Punctuation for Lawyers**

Punctuation for Lawyers completes the basic training course of clear Spanish. This course addresses the pragmatics of punctuation as defined by the Spanish linguist, Carolina Figueras.<sup>8</sup> It focuses on punctuation as a tool which allows the writer to control the interpretation of their own discourse.

### **Writing E-mails**

Writing E-mails is a three part course addressing the main problems in this communication channel and the social norms that govern it. Plain Spanish is a vital resource for this field.

## Writing legal texts

Writing legal texts is a two-part course specifically designed for litigation lawyers. I teach it with a former judge and a lawyer who has more than 40 years of trial experience. The course analyzes problems that affect clarity in litigation texts, such as excessive length, ambiguity and use of quotes.

At the request of the lawyers, two new courses will be added: "How to write an article" and "In search of a personalized clear style". The first is aimed at all those who are interested in writing an article to publish in one of the main reviews in Argentina so that they leave the course with a first draft. The second course is dedicated to lawyers who already publish books and articles.

In my experience, short courses that focus on specific points and genres work best. The design must be flexible and adaptable to the needs of the participants. The principles are constant, but the focus must change in to show the same concept from different angles. This reinforces the learning process. A wide range of courses reinforces the lawyers' trust in plain language and gives them more opportunities to confidently apply the guidelines in their own writing.

## Plain language in Spanish

In Argentinian legal circles, the clarification of language is not as widely recognized as in some other countries. The texts that lawyers study at university tend to be obscure, complex and cryptic. When they start to work, this situation continues and they have no experience of the plain approach to writing. That's all the more reason for a wide range of practical exercises in different types of text on our courses, so that the lawyers can transfer the skills to their own work.

Moreover, in Spanish, clarification of legal language is a relatively new phenomenon. Therefore, it is necessary to create templates for plain Spanish. Just as in ancient times orators used to model themselves on worthy examples, lawyers need templates today which do not exist in Spanish. Although the discussion about clarity in language is as old as the word itself, the reflection about the citizen as a listener in legal texts is recent. In Spanish there are few legal authors who write clearly with the reader in mind.

Also, the concept of a template is not well understood, in the sense of a document offering different forms of specialized communication in plain Spanish. The work carried out in Mexico with *Lenguaje Ciudadano* (Citizen Language) is groundbreaking in this field and serves as a model for the whole Spanish-speaking world.

One of the most important teachings I have acquired from this 13-year experience is that ignorance is the main ally of obscure writing. The lawyers, once they have been made aware of the possibility of clarification, accept it widely and are happy to include it in their writing. This is why we must spread the word about clarity in Spanish legal writing: you can only choose something you have been offered.

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## Endnotes

- <sup>1</sup> A preliminary version of this paper was given at the 4<sup>th</sup> Clarity International Conference, Lisbon, in October 2010.
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Mariana Bozetti graduated from the Universidad Católica Argentina, Buenos Aires, in 1990 with a degree in Literature. As well as her work at Marval, O'Farrell & Mairal, Mariana teaches academic writing at the Universidad Torcuato Di Tella, and proofreading of specialized texts at the LITTERAE. She has also been a researcher for the Real Academia Española. In 2009/2010, sponsored by the World Bank, she trained the anti-corruption team from the Argentine District Attorney's Office in plain writing skills.





# Teaching judgment writing in Canada

## Justice John I. Laskin

*Court of Appeal for Ontario*

Judges have to decide cases. They also have to write judgments. They have to explain why they decided each case the way they did.

Unfortunately, in the 1950s, 1960s and 1970s, judgment writing in Canada had a bad reputation. Some judgments were written clearly and concisely. But many were not. They were vague and verbose. They used specialized jargon—"legalese"—understandable only to lawyers and other judges.

Fortunately a small group of reform-minded judges decided to do something about the problem. They recognized that the role of judges in Canadian society was changing, and would change even more with the advent of the Canadian *Charter of Rights and Freedoms* in 1982. They also recognized that, because judicial decisions touched the lives of all Canadians, these decisions had to be understood not just by the insiders—the legal profession—but by the consuming public. And they recognized that the public wanted judgments to be more accessible, more transparent and more readable.

In 1981, this small group of judges established the first judgment writing course in Canada. They recruited writing instructors to work hand in hand with the Canadian judiciary to improve the clarity of Canadian judgments. Offered by the Canadian Institute for the Administration of Justice (CIAJ), this course has been held annually for 30 years. It is now a four-day course and it is perhaps the most popular of the vast array of education programs available to Canadian judges. Virtually every federally appointed judge has taken this course, usually soon after being appointed, and some have even returned for a refresher. The course has profoundly improved the quality of judgment writing in Canada.

The popularity and success of the course rests on three pillars: the course's focus, the faculty that delivers it and the teaching methods that are used.

### The course's focus

The course is not at all concerned with substantive legal analysis. Indeed the faculty assumes that the legal analysis in the participants' decisions is unimpeachable. Instead, the course focuses on communicating that legal analysis clearly to the judges' readers. In short, its focus is not substantive clarity but cognitive clarity.

Judges are taught the importance of writing an introduction about a page long, which tells the readers what the case is about and what issues must be decided. They learn that a good introduction turns readers into "smart readers" of the rest of the decision. They are taught the fundamental principle of clarity: give the context before the details. They learn that readers absorb and retain detailed information better when they have a context for it first. They are taught different ways to organize their decisions, the importance of plain language and how to avoid legal jargon, and ways to achieve a human voice in their writing. And they are taught the importance of the word *why*: they must give adequate reasons for their findings and conclusions. All of these skills are aimed at helping the Canadian judiciary to communicate their decisions more clearly to their many audiences.

### The faculty that delivers the course

Because this is a course on written communication, the founders wisely decided not to use judges as instructors. Instead, as I have said, they recruited a faculty composed mainly of experts in written communication: writing instructors and English professors. (One or two judges do teach and organize the delivery of the program.) The appeal of having these ex-

perts is obvious: Canadian judges want to be taught and learn from those who have the most relevant experience.

When the course started 30 years ago, the faculty was entirely composed of American instructors. Over the years, however, we have developed our own core of Canadian instructors. The faculty is now almost wholly drawn from Canadian universities and community colleges. It is an experienced faculty which, loyally, returns to teach the course year after year.

### **The teaching methods**

Judgment writing is a skill. It cannot be taught effectively by lectures or demonstrations alone. Judges have to “learn by doing”. Thus, the course uses three different teaching methods: lectures (normally aided by a PowerPoint presentation), small group workshops and individual discussions with a writing instructor.

A typical day consists of two lectures and two small group workshops. Each workshop has six or seven judges. A writing instructor leads the workshop and a judge is available as a resource. The judges taking the course are asked to bring with them two judgments that they have written. During the workshop they are asked to rewrite various parts of their judgments, applying the principles that they have learned in the lectures. They receive feedback on their rewrites from their writing instructor and colleagues in the workshop, and then they use the feedback to revise their rewrites.

By the end of the four-day course, judges will see a marked improvement in their own writing. I know that I did when I took the course! When they leave the course they will have a much better understanding of how to make their next judgment even better.

Once concrete example of how the course has helped judges is the writing of an introduction or overview. Before 1981, an introduction was conspicuously absent from Canadian judgments, even among our best judicial writers. Now most of our judgments include an introduction, which describes what the case is about and lists the issues to be decided.

The focus on communication, a faculty composed of writing instructors, teaching methods that incorporate the principle of learn by doing—these are the ingredients of a successful and enduring course in judgment

writing. But, at the beginning, the course had another ingredient that contributed greatly to its success: it had a champion. Justice Brian Dickson, then a judge of the Supreme Court of Canada and later its Chief Justice, and a magnificent writer, gave the opening address at the first CIAJ judgment writing course in 1981. His mere presence added to the course’s credibility. Justice Dickson’s speech has stood the test of time. Every year, a copy is distributed to the new batch of judges taking the course. His words have inspired and continue to inspire all of us to do better.

Here is but one excerpt from his speech: “What is needed is clear, succinct, forceful writing. It is not easy. It is time consuming. We may sweat blood for a month over a judgment but it is worth it if we can expunge clumsy legalese, tedious, obscure prose, overblown phrases, the vagueness and verbosity which are neither good law nor good literature.”

### **Recent domestic and international initiatives**

The CIAJ judgment writing course has been remarkably successful in its own right. It has also spawned two other initiatives, one domestic and one international. Last year, the CIAJ collaborated with the National Judicial Institute to deliver an advanced judgment writing course, entitled *Style and Context*, which I believe is the first of its kind in North America. To be eligible for this course, a judge has to have taken the basic CIAJ course and have been on the bench for at least five years. This new course is modeled on the CIAJ course, but has introduced two significant differences. First, instead of working on judgments that they have already written, the participants are asked over the four days to write a judgment from scratch, using an actual trial record. Second, instead of being led by a writing instructor alone, the workshops are co-taught by a writing instructor and an experienced judge.

The opening talk at this new course was given by Chief Justice Beverley McLachlin of the Supreme Court of Canada. She is a superb writer and she spoke passionately about the importance of writing well: “Good judgment writing”, she said, “is inseparable from good judging.” *Style and Context* is being held again this summer and will likely become an annual part of our judicial education curriculum.

For the last decade, Canadian writing instructors and Canadian judges have travelled abroad to teach judgment writing and to help the judiciary in other countries develop their own course in judgment writing. Here, I cite two examples.

Ed Berry and Jim Raymond, two of our most experienced and very best writing instructors, travel regularly to Australia and New Zealand to lecture, either on judgment writing or on the companion skill of delivering an effective oral judgment.

The National Judicial Institute, in partnership with the Canadian International Development Agency, developed a five-year "Linkages Project" with the Supreme People's Court of China. This project included a component devoted to teaching the Chinese judiciary our methods for designing and delivering an effective judgment writing course. Through these and other initiatives, we have exported our knowledge about judgment writing to many other countries.

The key to all of this—to the undeniable improvement in judgment writing in Canada—has been the 30-year partnership between a dedicated group of writing instructors and a judiciary eager to make their decisions more accessible and more transparent to the Canadian public. For this we owe a debt of gratitude to our writing instructors, who have taught us the critical elements of clarity.

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**Justice John Laskin** is a judge of the Court of Appeal for Ontario. For ten years he co-chaired the annual CIAJ judgment writing course. Last year, he helped organize *Style and Context*, the first advanced judgment writing course in Canada. He has taught decision writing at seminars for judges and members of administrative tribunals both in Canada and abroad.



**New!**

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# A most dangerous clause: Plain language prevents legal malpractice in software licensing

**John L. Geiger**

*Attorney, Los Angeles, California*

We begin at the crossroads where contract law, copyright remedies, the Reciprocity Norm, and “writing tight” collide. This article examines the process of contract authorship by negotiations.

## **Negotiations as collaborative authorship**

A contract is, by definition, a collaborative document. It expresses *mutual* intent. The dominant metaphor, echoed by innumerable courts, is that a contract reflects the parties’ “meeting of the minds.” And that meeting typically takes place through negotiations. (I exclude shrink-wrap, click-through, and other such routine consumer agreements entered into fleetingly and without legal counsel.)

A blank page is rarely the starting point. Usually, negotiations begin with one party’s standard contract form on the table as the baseline. A significant portion of the actual writing has taken place outside the room and prior to actual negotiations.

Then, once the respective negotiations teams are in the room, the boilerplate draft is approached on an issue-by-issue basis. The negotiations team will (1) accept, (2) reject and delete, or (3) reject and re-write the relevant clauses.

## **The frequency-mastery misconception**

Every day of our lives involves some sort of negotiation. Negotiation as a “fact of life” is not a new concept, but it newly pervaded our popular culture through the international best seller *Getting to Yes*.<sup>1</sup>

Yet there is a widely held misconception about negotiations, and, in particular, about negotiators. Most everyone fancies themselves a better-than-average negotiator. Indeed, a similar misconception exists as to language use.

That is, since everyone uses language every day, most everyone fancies themselves quite proficient. Just ask around.

But sadly for lay practitioners, whether the art is oral negotiations or written language, their success is inherently limited. It comes from habit and force of personality, not by concerted study and practice. They may have some good tools, but not a full tool box.

The members of a negotiating team have different approaches and different default positions. How do they reconcile this with their unified goal to reach the best deal possible?

## **A hypothetical example**

Let’s suppose you’re procuring a software license. Your negotiations team is:

- your lawyer
- a plain language consultant
- A lead negotiator (a company representative who is neither a lawyer nor a plain language writer).

You’ve been at the negotiations table awhile. The other side makes concessions only when you do. A few issues remain. One is the license grant clause, which currently reads:

Licensor grants to Licensee a non-exclusive, non-transferable, perpetual license to use the Software.

The other side wants an edit:

*Subject to the terms and conditions herein, Licensor grants to Licensee a non-exclusive, non-transferable, perpetual license to use the Software.*

## Do you accept the proposed edit? What does your team advise?

### Lawyer:

YES! What's the harm? It's redundant. Just belt-and-suspenders drafting to make sure they get paid. Look, within the four-corners of the contract, every clause affects every other clause anyway. Breaching one sends the entire contract into default.

### Lead negotiator:

YES! Quid pro quo. That's the negotiations dance. We need reciprocity to keep moving and close this deal. It's our turn to give one. Sounds like this is an easy one to give up.

### Plain language consultant:

NO! If it adds nothing, don't add it.

Whom do you listen to? Who is correct? Interestingly—problematically—the answer to those two questions is not always the same.

### More mathematical, less rhetorical

When it comes to all things legal, lawyers hold the trump card. Understandably so. Lawyers also hold the greatest risk. As a specially licensed professional in a highly-regulated practice, they owe their client a fiduciary duty of care, and when they err—or even when they don't but the client is dissatisfied—they're subject to malpractice claims. That's why lawyers usually carry exorbitantly expensive malpractice insurance.

Yet legal counsel is well advised to retain the services of a plain language practitioner because of the unique nature of contract drafting. Contract drafting is unlike other forms of writing familiar to law students, beginning lawyers, or even experienced non-transactional lawyers. All are more familiar with exposition, writing to inform or persuade, to engage with repetition (for emphasis), metaphor (for visualization), and varied sentence construction (for pacing). When such are employed well, the rhetoric becomes poetic, giving way to a certain *voice* in the writing.

Contracts lack voice, as well they should. Contracts have a singularity of purpose—to accurately memorialize the deal in language that will be interpreted by later readers in precisely the same way.<sup>2</sup> Contract writing is an

additive process. Much more mathematical than rhetorical, with nothing extraneous in the equation. This, as one of our esteemed plain language colleagues elegantly opines, is “writing tight.”<sup>3</sup>

So how should this negotiations team interpret the proposed clause?

### The rule against redundancy

The Lawyer and Lead Negotiator take the dangerous position that it is safe to add a clause because it adds nothing substantive.

But a contract must be read to find meaning in every clause and word so that no clause or word may become redundant.<sup>4</sup> The risk is that ostensibly redundant language will be given independent and unintended meaning by the courts. That's the lurking malpractice trap.

### The lurking dilemma: covenant or condition?

Suppose we accept the proposed edit. Then later, we stop paying the license fees under the contract. What happens? The remedies and results are very different depending upon whether the clause is construed as a *covenant* or a *condition*.

#### Covenant = contract law = just money

“Subject to” and “provide that” phrases are what I call *tying clauses*. They attempt to tie two otherwise separate and independent clauses together, usually for some added legal effect.

Without the added tying clause here, the promise to pay the license fees—undoubtedly found elsewhere in the contract—is a mere covenant. No payment made? Then the licensor can declare a breach, terminate the contract, and seek the unpaid balance. We might retain license rights, but only after payment in full. In effect, we will be liable for standard contract damages.

#### Condition = copyright remedies = money & more

Over the years, I've seen attorneys make the seemingly benign concession to add a *tying clause* to a software license grant provision. Their doing so always offended my plain language sensibilities. But it wasn't until recently that courts began to find meaning to these otherwise redundant tying clauses.<sup>5</sup>

Software licenses are really copyright licenses in thinly veiled disguise.<sup>6</sup> As such, the grant clause is subject to federal copyright rules and remedies that do not impact the rest of the contract. But *tying clauses* placed in front of an otherwise unrestricted license grant creates qualifiers. In effect, we'd lose our license if we fail to pay the license fees. But also, we are now subject to copyright infringement remedies, which are broader than mere contract remedies, and include injunctive relief and statutory attorney's fees.

Even if we were not aware of the esoteric legal rule behind the proposed edit in the hypothetical example, we could still avoid the malpractice trap by adhering to plain language drafting principles. The corollary is similarly instructive. If the boilerplate had the tying clause already, the Lawyer and Negotiator would likely advocate for no deletion, tolerate the redundancy, push for a speedy close. A plain language professional on the team would have likely spotted the redundancy and removed the problem.

### Toward a new collaborative model

In this hypothetical example, the negotiations team is segmented to isolate concerns and approaches. Of course, not all negotiation teams are so conveniently segmented. Teams may be consolidated, with members having multiple roles (*e.g.*, attorney-lead negotiator). Or teams may be further expanded (*e.g.*, lead negotiator role shared among several company departments, such as production, marketing & sales, finance, and risk management). But whether consolidated or expanded, a team is most successful through the full consideration and prioritization of cross-disciplinary concerns.

Risk mitigation in contract negotiations certainly suggests the need for a new collaborative model. Because of the additive nature of contract drafting, and the rule

against redundancy in contract interpretation, plain language is more than a mere aesthetic preference.

To this end:

- Lawyers, in collaboration with plain language editors, should not add language unless it adds substantive content, and
- Plain language editors, in collaboration with lawyers, should not delete language unless it lacks substantive content.

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### Endnotes

- <sup>1</sup> Robert Fisher and William Ury, *Getting to Yes* (Houghtlin Mifflin Co. 1981)
- <sup>2</sup> Charles M. Fox, *Working with Contracts: What Law School Doesn't Teach You*. Practising Law Institute 2002, Sec. 1.3 - "Contracts: A Unique Type of Writing."
- <sup>3</sup> Martin Cutts, *Oxford Guide to Plain English, Third Edition*. Oxford University Press 2009, Chapter 3 - "Writing Tight."
- <sup>4</sup> California *Civil Code* section 1641 (Effect given to all of a contract, every clause and word).
- <sup>5</sup> *Jacobsen v. Katzer* (Fed. Cir. 2008) 535 F.3d 1373, 1380.
- <sup>6</sup> David W. Tollen, *The Tech Contract Handbook: Software Licenses and Technology Services Agreements for Lawyers and Businesspeople*. American Bar Association Publishing 2010, p. 14.

**John L. Geiger** is an attorney with more than 25 years of transactional experience. He is author of the award-winning *Government Contracts in Plain Language for Small Business*, recognized by the Los Angeles County Quality & Productivity Commission, California State Association of Counties, National Association of Counties, and Center for Plain Language.



# Nova Scotia regulations drafting: a collaboration that works well

## Rachel L. Jones

*Registrar of Regulations, Nova Scotia Department of Justice, Canada*

The editors and lawyers in Nova Scotia's Department of Justice work together to develop laws that are clear not only to the lawyers and subject-matter experts, but also to the everyday people who are governed by the laws. It's a good example of how a collaborative relationship between plain language practitioners and lawyers can work, and a success story that I'm very pleased to share. Top-down support, cooperation, respect and trust are the keys to the success of this collaborative process.

Regulations influence the lives of ordinary citizens daily. They regulate everyday conduct, licensing schemes, programs, benefits and prohibited behaviours, so it is imperative that they be clear and accessible. As plain language practitioners, we are fortunate at our workplace because plain language drafting is well supported from the top down—across government and within the Department.

This means that plain language editing is well received and the need for plain language is rarely challenged. Plain language is recognized as being essential to good government, enhancing government transparency and efficiency and enabling true participatory democracy and direct citizen involvement.

### Background on the Office of the Registrar of Regulations

Unlike in most other Canadian jurisdictions, our Legislative Counsel draft statutes only; they don't draft the regulations made pursuant to statutes. Regulations are drafted either by senior policy staff in the respective administering departments, or by Department of Justice lawyers. Either way, they must be reviewed by Department of Justice lawyers to ensure that they are legally authorized under

the enabling statute and do not contravene the constitution or any other general statutes or principles of natural law and justice.

In drafting and reviewing regulations, lawyers are therefore performing the dual tasks of legislative drafting and advising the client department on the legal issues surrounding the proposed regulated subject area—tasks that are usually divided between the lawyer and the legislative counsel in other jurisdictions.

The Office of the Registrar of Regulations registers, publishes, consolidates, and maintains Nova Scotia's regulations, ensuring public access to the laws. Our office is currently staffed by three editors and two clerks. None of the editors has any specialized training in plain language drafting; rather they have learned through on-the-job training and from the collective experience and expertise of organizations such as Clarity and PLAIN. Two of the editors have law degrees, while the third has more than 20 years of experience working with legal documents.

As a central office with quick access to related and comparable legislation, and familiarity with similar regulatory schemes and provisions, we are a natural fit to assist with the drafting process. The editor's role in regulation drafting is to ensure that the regulations are consistent in style and format and are in plain language. Over time, the role has evolved to fill in some of the gaps left by not having dedicated legislative drafters. The review is now a much more substantial plain language review, and the office has developed plain language standards and guidelines to provide consistency and guidance to drafters.

### Statutory review of draft regulations

Under Section 11 of Nova Scotia's *Regulations Act*, the Deputy Attorney General has a duty to ensure that "the form and draftsmanship of the proposed regulation are in accordance

with established standards." In 2005, the Department's *Style and Procedures Manual* was updated to include guidelines and standards for plain language regulation drafting. Initially this was to support the statute's revision powers and to assist departments in understanding what revisions would be made and the rationale behind the changes. These revision powers are quite broad and include the power to:

- Alter the language of the regulations as may be required in order to preserve a uniform mode of expression
- Make such minor amendments to the regulations as are necessary in order to state more clearly what the Registrar deems to have been intended thereby
- Make such amendments as are required to reconcile seemingly inconsistent regulations or to correct clerical, typographical or printing errors.

While the Registrar's revision powers have yet to be exercised, the manual has not only provided the office with a valuable tool that is now shared with drafters, but also with a handy "carrot and stick" to ensure the guidelines are followed. Drafters soon realized the advantage of including plain language at the drafting stage when they still have some input into the language instead of having changes imposed on them through a revision after the text has already become law. As they become more familiar with the benefits of plain language, drafters are equally attracted by the many benefits of plain language—the "carrot" being laws that are easier to understand, easier to administer and easier to enforce throughout the justice system.

This more thorough review allows the office to fulfill its primary responsibility—to provide public access to the law—by ensuring that the laws are not only available, but are also *readable*.

### The process

Unlike many business situations, where proposed plain language wording is "sent to legal", our office's review is done *after* the policy staff have established the regulatory regime, and *after* the lawyer has signed off on the substantive legal effect of the draft regulations. The draft regulations are submitted to us and reviewed, then returned to the law-

yer—usually a few times back and forth—until the final text is agreed upon. The exact process depends on working styles and the relationship between the editor and lawyer. Only after both have signed off on the draft can the regulations proceed into law. Any changes required to the draft after this stage must be reviewed again by both.

The editors are primarily looking for:

- ambiguities created by word choice, word placement and structure
- issues of syntax
- unnecessary use of passive voice, nominalizations, legalese and jargon
- natural word order
- logical organization
- informative headings
- division of text into short and effective provisions.

In a process where actual audience testing is often impracticable, the objective review of the editor serves as a form of audience testing. As someone who is not intimately familiar with the subject area, the editor can place themselves in the shoes of the everyday person—identifying unclear procedures, instructions or requirements and misleading or missing information.

When deconstructing complex sentences and untangling tongue-twisting technical jargon, inevitably questions about the intended meaning of the text arise. Editors are able to identify these problematic provisions, ask questions about the intended meaning and suggest alternatives. Often these questions can lead to important policy and legal issues being further examined and resolved. This results in a better and more complete final product.

Often, there is an added benefit to the review process. It helps policy staff to better understand their own legislation and regulations, and the role these play in their work and for the public.

When even the smallest changes to punctuation can radically change the meaning of a sentence, editors have to be particularly aware of the legal effect of the changes they are suggesting. Editors therefore are encouraged to:

- clearly explain the reasons for their changes



- not only identify ambiguities, but explain why the text is ambiguous
- identify and explain any assumptions made about the intended meaning or legal effect
- offer alternatives for any other likely meanings.

### Why it works

One of the questions *Clarity* posed for this issue was: “Should plain language professionals receive training in principles of clear legal writing as an accredited skill?” To this, I would answer a firm “yes” for our office. I have three reasons.

- 1) The lawyers are much more comfortable discussing changes to the text when they are confident that the editors appreciate the legal nuances of the text and how the language choices can affect the legal meaning.
- 2) The lawyers and editors can engage in an open and informed dialogue about what they are trying to accomplish with the text.
- 3) With this shared understanding, the lawyers and editors are working toward shared goals, not from competing priorities and agendas.

The editors spend much of their time breaking down provisions into their grammatical and logical pieces, and then reassembling them in a clearer and more straightforward language and legislative structure. They eliminate syntactical ambiguity and strive to limit the text to one idea per provision. To do this effectively, the editors must understand the underlying intended legal purpose and effect of a provision. Is it creating rights, duties, powers or prohibitions—or exceptions to any of these?

They must also be able to identify the components of the legislative provision—the legal subject, the legal action, the circumstances under which it applies and any limitations or exceptions—not only to ensure that the provision is complete, but to identify superfluous words or phrases. The editor must be able to explain the reasons behind their choices when the language is challenged, and be persuasive when the issue is one of clarity rather than legal substance.

A strong legal background means that editors can help the lawyer select the most appropriate, and simplest, choice within the legal context. Suggested changes enhance and complement, rather than alter or compromise the legal effect. Lawyers and editors can frankly discuss obstacles, issues or ambiguities and explore creative solutions together.

Lawyers have come to see the review as an invaluable, fresh perspective on the text after having been hip-deep in the details while consulting with policy staff. The editors have a slightly different way of looking at things that enables the lawyers to step back and see the regulations afresh.

### The culture

When the lawyer and the editor understand and respect what each is trying to accomplish with the regulatory text, you have the foundation for productive collaboration. Editors and lawyers interact daily and are very accessible to one another—casual conversations can take place around the water cooler. In a day and age where so much work is conducted impersonally via e-mail, this face-to-face interaction provides a much better opportunity for relationship building.

The process is not perfect. Inevitably there are times when political deadlines arise and the review must be expedited, or when drafters and departments are “wedded” to particular language choices and nervous about change. But all in all, there is a fairly good understanding that any wording the department and lawyer come up with is subject to change once it is reviewed by our office.

Even when the process proves to be more time consuming and painful than was expected by the drafters and policy staff, feedback from lawyers and departments is resoundingly positive. It is precisely this respect for editors and the work they do that helps bridge the legal and plain language professions.

These documents do not go away once they are made law. Everyone wins when laws can be read and understood by the citizens who are governed by them, the officials who administer them, and the lawyers who must interpret and advise on them.

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**Rachel L. Jones** was born in Birmingham, England, and emigrated with her family as a young child to the shores of beautiful Nova Scotia, where she still makes her home in Halifax. Rachel is an alumnus of the University of Kings' College Foundation Year Program, has a BA in English from Carleton University in Ottawa, and a law degree from Dalhousie University. She is currently employed with the Nova Scotia Department of Justice as Registrar of Regulations for the Province, and has spent most of the last 15 years trying to bring its regulations into the 21st century.



### Contributing to the journal

*Clarity* often focuses on a specific theme (like conferences or drafting or standards), but we also publish articles on a variety of other plain language topics. Please submit your articles to the editor in chief for consideration.

Would you like to be a guest editor? Our guest editors gather articles, work with the authors, make layout decisions, and edit and proofread a single issue. If you would like to guest edit an issue of the *Clarity* journal, send an email to the editor in chief.

Finally, if you have ideas about improving the journal, the editor would like to hear from you, as well. Our editor in chief is Professor Julie Clement, with the Thomas M. Cooley Law School. Email her at [clementj@cooley.edu](mailto:clementj@cooley.edu).

## Member News

### From Neil James:

Some high-level support is beginning to emerge in Australia for a plain language program within the Commonwealth Government.

In March, the new Commonwealth Ombudsman asked the Foundation to brief his leadership team about plain language and what is happening in various parts of the world.

He's now given a speech diagnosing poor communication as a chief cause of the complaints he receives, and arguing for a plain language program as the first part of a 5 point plan for reforming government.

You can read the speech at: [http://www.ombudsman.gov.au/files/6\\_September\\_2011\\_Why\\_do\\_good\\_policy\\_ideas\\_turn\\_into\\_porridge.pdf](http://www.ombudsman.gov.au/files/6_September_2011_Why_do_good_policy_ideas_turn_into_porridge.pdf)

It was reported in the Canberra Times at: <http://www.canberratimes.com.au/news/local/news/general/bureaucrats-language-on-notice/2283247.aspx>

In November, the Ombudsman is holding a national conference on government. The program is not published yet, but it will include a workshop on plain language. You can follow the details at: <http://www.ombudsman.gov.au/pages/about-us/events/national-conference-2011/>

Secondly, at the recent national editors conference, a motion was supported that the Institute of Professional Editors (the national accreditation body for editors in Australia) work with the Plain English Foundation to lobby the Commonwealth over plain language. If anyone else in Australia would like to get involved with this push, please get in touch with me.

As a famous Australian poem opens: 'There was movement at the station'.

## Developing legal rights information: Collaborating with external legal advisors

### Caroline Lindberg (with editing by Kim McCutcheon)

*CLEO (Community Legal Education Ontario/  
Éducation juridique communautaire Ontario)*

I work as a staff lawyer at a publicly-funded, community-based organization in the Canadian province of Ontario. We develop legal rights information in plain language for people with low incomes and other disadvantaged groups. It is important to us that the information we produce be useful, respond to needs, and be both understandable and legally accurate.

We have what may be a unique model for producing plain language legal information. We hope others will see in it approaches they can apply in their work. The strengths of our model, we believe, lie in collaboration, shared commitment to goals, and the recognition that there are varieties of expertise involved.

Our staff includes both lawyers and editors with clear language and design skills. For each project, a staff lawyer and an editor work together. We also work with external lawyers who are currently practising in relevant areas of law.

As a CLEO staff lawyer, I connect with the outside practitioners, seeking and managing their input. While staff lawyers at CLEO develop knowledge in the relevant areas of law, we count on lawyers who are practising in the field to help us achieve legally accurate information that is useful to the intended audience. Most of these lawyers are providing services funded through Ontario's legal aid system for low-income people. They volunteer their time to us because they believe in the value of our work and find our materials useful for their clients.

I will discuss my role and the role of these outside lawyers by addressing three topics:

- deciding on projects

- applying plain language
- determining legal accuracy.

### Deciding on legal information projects

As the leading producer of public legal education materials in Ontario, we are often asked to develop materials on particular topics. But before we embark on a project, we need to consider whether it will be effective. We need to know the purpose of the document and the audience for it. We need to have a plan for getting the information into the hands of the people who need it.

Lawyers who work with the communities we serve are often able to identify legal information needs in those communities. Sometimes they contact us to suggest that we develop resources in response to those needs. Our role is to ask the questions that determine whether such information is likely to be useful and effective. For example, we heard from these lawyers that people were being cut off disability benefits after getting an inheritance. They did not know that they could have protected their right to continue receiving benefits. With the assistance of lawyers dealing with these clients, we developed a publication that has basic information about the implications of an inheritance and when and where to get legal help. In the past few years, we have distributed almost 30,000 copies and people have repeatedly told us how much the information has helped them.

But while lawyers on the front lines can tell us about needs, we may conclude that plain language legal information would not be an effective response. For example, people who apply for disability benefits must show that they meet the relevant definition of disability. Many applications are refused, but there is a right to appeal to an independent tribunal. Legal aid clinics represent people who appeal but the need often exceeds the clinics' capacity. Clinic lawyers asked us to produce

“self-help” materials for people who could not get representation. We did not think this would be effective for two reasons: many of the appeals involve people with psychiatric illnesses or cognitive impairments who face great challenges in advocating for themselves, and preparing a successful appeal often requires medical reports that clinics obtain using legal aid funds. In one community, exploring these issues with clinics led them to adopt a different strategy—training private bar lawyers to take these cases, coupled with a commitment from the local legal aid office to fund that work.

### Applying plain language

External legal practitioners help us develop the content of a publication and review the text before we finalize it. When we send them text for legal review, we explain that we are asking for their expertise in the relevant areas of law. We identify the intended audience and note that the text has already been edited according to clear language principles. We ask reviewing lawyers to tell us if any changes are needed to make the information accurate. These changes could involve adding, removing, or revising content. We ask them to be specific and explain their reasons.

It is my job to consider their feedback. When I started working at CLEO, I was told that the reviewing lawyers would “know the law” and my job was to rely on their legal opinions so that I could ensure that the legal accuracy of the text was not compromised by plain language. Over time, I have come to a more nuanced understanding of my role and an appreciation of how plain language contributes to the accuracy of information. To begin with, I need to determine whether a reviewer’s feedback reflects concerns about legal accuracy, as opposed to writing style. I may need to review the authorities relied upon by the reviewer, so that I can consider the bases of their opinions.

More often than not, reviewing lawyers suggest additions to the text. I believe this arises from a tendency towards including all or almost all of the information that may be relevant. Sometimes the added information will be helpful for the intended audience. Occasionally the information is essential, as without it the text would be misleading or simply wrong. But often it merely provides

additional legal information that goes beyond what is needed, given the purpose of the document and its intended audience. These suggestions may add to my understanding of the legal issues and they reflect the expertise of our reviewing lawyers. However, my job, in consultation with a plain language editor, is to determine whether adding the information is necessary.

For example, we produce a publication called *Police Powers: Stops and Searches*. User feedback included the suggestion that, in our next edition, we add information about the rights of minors when they are arrested and detained. The draft text that our reviewing lawyer provided included information about the rules of evidence that govern admissibility of statements made by minors in custody. This was helpful to me in understanding the scope of the rights involved but went beyond what we needed to include, given the focus of the publication. In the context of our plain language legal work, the final decisions about content rest with CLEO, not our reviewing lawyers.

### Determining legal accuracy

A wide range of community organizations order our materials because they trust us to provide legally accurate information. The responsibility for legal accuracy rests with CLEO staff lawyers. I see the goal of legal accuracy as comprising two elements:

1. I understand the legal information that the text is intended to communicate and, in my opinion, the text is a correct statement of that information.
2. I believe that others and, in particular, members of the intended audience, will interpret the text the same way I do.

Understood in this way, what we call legally accurate information is essentially information that is unlikely to mislead the intended audience. To imagine an absolute or purely objective standard for legal accuracy is to deny the role of the audience. Reviewing lawyers who have expertise in the subject matter will be qualified to confirm the first but not necessarily the second element of legal accuracy.

Legal accuracy means more than just “the law” as it is written or judicially interpreted. It means that the information should reflect the way the law is applied. Sometimes there is a

gap between what the law says and how it works. For example, Ontario's legislation on the right to public health insurance gives an applicant who is refused coverage by a local office the right to appeal to an independent tribunal. In practice, there is a preliminary, less formal appeal not reflected in the legislation. We could have produced a clear language document on this topic on our own, but without the input of a health law practitioner, this crucial piece of information would not have found its way into our publication.

Our reviewing lawyers advise and represent individuals, so they are accustomed to applying the law to one set of facts at a time. In working on public legal education materials, I need to think about how legal information may apply in a variety of situations. And while we recommend that people seek legal advice, we still need to think about the impact of information on someone who has yet to consult a lawyer or may not have access to one.

Take as an example the deadline for filing an application with a court or other tribunal. Often it is possible to seek an extension. When a client comes in for help, a lawyer can determine whether the deadline has passed and assist, either with filing the application on time or seeking an extension. When we prepare materials, the audience includes people who can still meet the deadline and people who have missed it. Because an extension is never guaranteed, we want to emphasize the importance of meeting the deadline. But, we do not want readers who have already missed the deadline to be discouraged from pursuing their legal rights. We need to choose our wording carefully, keeping both sets of readers in mind.

While your context may be quite different, our hope is that you will find aspects of our model that you can apply when working with outside legal experts. We start with a shared vision and commitment, clearly defined roles, and respect for the varieties of expertise that different contributors bring to the work.

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*Caroline Lindberg is a lawyer who began in private practice, then worked in various community legal clinics, and now specializes in public legal education. She is a graduate of the University of Toronto Law School.*



*Kim McCutcheon is an editor at CLEO and has been a clear language editor for more than 15 years. Before that, she worked for many years in non-profit housing. She has degrees in Journalism and Sociology.*



## A ‘four minds’ approach to editing creates clarity

### Tania McAnearney

*Principal, To a T, New Zealand*

Lawyers, it seems, prefer to work with lawyers. This is especially true when it comes to fine-tuning their legal writing. They prefer to work with someone who speaks their lingo, someone who is legally trained and who understands the subtle nuances of legal words and phrases.

I acknowledge that my introductory statement is very generalised. However, in my ten years of legal editing and writing experience, I have yet to meet a lawyer who hasn't needed the assurance that I am indeed a lawyer myself, before allowing my free reign on their work. For example, last year, I met with a representative from one of the most prestigious firms in New Zealand. She wanted to find out about plain language training. I was well-equipped to tell her all about the qualifications and experience of the plain language trainers from the company I worked for at that time. That didn't interest her. She knew I was a plain language editor with a qualification in law. So what she really wanted to know was, could I do the plain language training?

Lawyers need to be assured that their documents are still absolutely in line with the law. They want someone whom they can trust to do that—someone of their own kind. And by ‘trust’, I am in no way undermining the value of the services of other plain language professionals. I'm suggesting something quite different. I suggest that a way to make sure a legal document gets the best plain language edit is to tackle it from the perspective of four minds: the lawyer-client (or firm), a plain legal-language editor (such as myself), a professional editor (such as my colleague) and the reader (user).

This is exactly how I tackled a complex construction contract last year. When a colleague of mine was approached with a plain lan-

guage edit of a 100-page standard contract for design and build, he immediately contacted me. He felt that without legal knowledge, he wouldn't do justice to the contract—quite literally. And I jumped at the opportunity to sink my teeth into so much legalese.

Our first task was to give our client an estimate of the hours we'd take to complete a plain language edit of the contract. Before working this out, we asked who the intended audience—the user, would be. We were told that the document was intended for civil engineers and construction managers—in other words, people who most likely had a tertiary education, but no legal knowledge.

Then we had to estimate how long it would take us to complete the plain language edit. We reckoned that the process would take us about 80 hours altogether. Next came the hard part. Any editor worth their salt would understand why this document would take so long to edit, but explaining this to our client was a different story. So we took time to consider how we would divide up the editing between us. We eventually decided on using a six-stage process: a light edit, a structural edit, a first ‘line’ edit (also called ‘text’ edit or ‘sentence-level’ edit), a second line edit, a proofread and user-testing. I would attend to the first three stages, my colleague to the second two and the document would finally be ‘tested’ on a few laypeople in the construction industry. After we explained this process in a report to our client, he readily agreed to us going ahead.

### Light editing stage

This contract was a classic example of traditional legal writing—at its worst. So before I tackled the structural edit, I spent quite some time making sense of a number of the contract's barely comprehensible clauses. I wanted to make sure that the text was clear enough for me to properly and comprehensively do the structural edit. To do this, I

edited clauses where there was a lot of repetition or cross-referencing and started changing sentences from the passive voice to the active. I also couldn't help myself from editing any glaring grammatical errors!

### **Structural edit**

To say that the clauses in this contract were in absolutely no order is putting it mildly. I did a major overhaul of the structure of the document and moved clauses around so that the text flowed logically and made sense. Deciding on where each clause best fit took up a substantial part of the structural editing phase. I added a much-needed table of contents with parts and clauses and added plenty of white space (the original contained hardly any). I deleted the definitions section, which was unnecessary and made the document far more complex than it needed to be. I didn't want to burden the user with cross-referencing between clauses each time a definition appeared in the text. So, I did one of two things:

- chose a simpler word or phrase to use in place of the original word
- placed the definition of the word in brackets next to the word the first time it appeared in the text, and then again in the next part of the document.

I also changed some headings. For example, I felt that 'passing of ownership' better describes what 'passing of property and vesting' means to people without a legal background.

### **First line edit**

I then moved on to the first stage of our copy-editing process. And this is where my foreign legal qualification sets me aside from other plain language lawyers (I am originally from South Africa). I looked at the document from an outsider's perspective: was it clear, concise and readable on a first read through it? However, I also knew how far to take the plain language edits of this legal document: I knew what legalese could be rewritten and I knew when a term of art needed to remain unchanged.

Heaps needed changing. I used 'workers' instead of 'servants, workmen and staff'. And I changed various legal phrases, such as, 'making good defects' to 'rectifying defects' (but kept the name of the certificate as 'the certificate of making good defects').

I encountered the usual hurdles of having to convince our client that the first and second person is, in fact, formal enough. And once our client was convinced, it took ages to replace the parties' references with personal pronouns, such as 'you' and 'we'. I made some stylistic changes, such as using bullets instead of roman numerals and deleting the obsolete margin notes. I also spent a lot of time cross-referencing clauses from the original contract to the edited version and deleting repetitive text.

If I didn't understand a specific point of law, I didn't attempt to assume anything. I queried it with the client (using the comments function in Word), so that I could decide whether to rewrite it or keep it as it was. When I received the answers back, I made any necessary changes and then handed the contract over to my colleague for his part in the editing process.

### **Second line editing stage**

At this level, my colleague focussed on a few key areas that helped lighten the sheer load of words in sentences and improve the contract's readability. Here they are, in order of importance (and probably also difficulty):

- restructuring and reformatting lists, whether bulleted or in-sentence
- changing the last few passive sentences to active
- breaking up over-long, multi-clause sentences (especially those with excess qualifications) into more discrete, reader-manageable bites
- removing excessive repetition
- shortening or simplifying wordy phrases, especially those that tended towards vagueness
- making the punctuation serve the syntax.

Note that there were three editing levels for changing passive phrases to active and for removing excessive repetition. Some documents, like this one, simply contain so much passive writing and repetition of text that it took two goes, one by me and one by my 'second pair of eyes' to make sure we'd caught them all (or most of them at least!).

## Proofreading stage

My colleague then perfected the plain language edit and proofread the contract to make sure we didn't miss any spelling or grammar errors. He also did a very detailed check for consistency of formatting, punctuation, terms, syntactic structures and so on. And we jointly prepared a report to our client summarising the main changes we made.

## User-testing stage

We then arranged for the document to be tested on a few industry users to see how well our plain language edit worked.

The result of our efforts was an extremely satisfied client and contented users. It's clear that, with complex legal documents, a 'four minds' approach to editing truly can create clarity.

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## Linguistic Lingo for Lawyers—possessive puzzles

The apostrophe  
Found on both sides of letters  
The right side and wrong.

So complains communications trainer Craig Harrison on the National Punctuation Day website (<http://www.nationalpunctuationday.com/>)—and I'm sure Clarity readers can feel his pain. Possessive apostrophes cause no end of problems: misplaced apostrophe's prevalence is prolific, not to mention peoples tendency to omit necessary marks and to add superfluous ones'. (Don't write in: I jest!) If only everyone could learn and apply the rules! Dreaming of this punctuation-perfect paradise, I'd covered the basics some time ago in 'Tip of the month', a regular slot in *Pikestaff*, the monthly newsletter I write for Plain Language Commission.

But a recent request from a customer rather rocked the boat, highlighting an area made tricky by both the regular plural and the possessive of English nouns being formed by adding 's':

Please settle an argument.

A few years back a man set up an illegal business that basically comprised him maintaining a list of workers from the construction industry who, at some point in their working lives, had taken part in industrial action. He hawked this around to all the major construction companies offering, for a fee, to check whether prospective employees were on his list. The question is about the line below. Should 'workers' have an apostrophe? It's not their list, they just happen to be on it. Construction industry workers blacklist

As the customer notes, the blacklist clearly doesn't belong to the workers, so some people may claim that an apostrophe is unnecessary. Not so, as William Sabin points out in *The Gregg Reference Manual* (McGraw-Hill Irwin, 2010):

627a. Possessive forms may express a number of different relationships, only one of which refers literally to possession or ownership:



my boss's approval (meaning the approval of *my boss*)

Belknap's farm (meaning the farm *possessed or owned by Belknap*)

IBM's product line (meaning the product line made or sold by IBM)

Faulkner's novels (meaning the novels written by Faulkner)

Matisse's paintings (meaning the paintings created by Matisse)

Frank's nickname (meaning the nickname given to or used by Frank)

A two weeks' vacation (meaning a vacation for or lasting two weeks)

627b. To be sure that the possessive form should be used, try substituting an *of* phrase or making a similar substitution as in the examples above. If the substitution works, the possessive form is correct.

Substituting any of the phrases listed in 627a doesn't really work for our 'blacklist' example. And Sabin continues:

628a. Do not mistake a descriptive form ending in [plural] *s* for a possessive form.

sales effort (*sales* describes the kind of effort)

savings account (*savings* describes the kind of account)

news release (*news* describes the type of press release)

earnings record (*earnings* describes the type of record)

So it seems we must interpret meaning, deducing the relationship between the noun head (in our example 'blacklist') and the premodifier ('construction industry workers'). The latter phrase does seem to describe the type of blacklist, so it seems we're sorted: no apostrophe it is.

But the guidance here is quite complex and requires skills in interpreting linguistic subtleties: I wondered, isn't there a simple test we could apply? This could be particularly useful in explaining the rule to people without expertise or fluency in English (either in the training room or in writing—I could feel another 'Tip of the month' coming on). So back to Bill's bible (that is, the bible belonging to

me but written by Bill) I went:

628b. Some cases can be difficult to distinguish. Is it *the girls basketball team* or *the girls' basketball team*? Try substituting an irregular plural like *women*. You wouldn't say *the women basketball team*; you would say *the women's basketball team*. By analogy, *the girls' basketball team* is correct.

Based on the dilemma arising only with nouns that have regular plurals (in 's'), this sounds such a neat and simple test. But it doesn't seem to me to work with the irregular plural suggested: *construction industry women blacklist* sounds distinctly wrong. In fact, is there any phrase where 'women' (or 'men' or 'children') can be used as a noun modifier? I couldn't think of one.

When I went looking in the other usage manuals on my bookshelf for alternative tests, I found none, but I did think one up based on what I read in Greenbaum & Quirk's *A Student's Grammar of the English Language* (Longman, 1995):

Plural nouns [that premodify] usually become singular, even those that otherwise have no singular form:

The leg of the trousers ~ The trouser leg

So the test is: if in doubt about whether the premodifier is possessive or descriptive, check if it makes sense in the singular. If it does, it's descriptive, not possessive. The test seems to work in most cases—for example, 'construction industry worker blacklist' sounds fine, while 'girl basketball team' doesn't. But it doesn't work where the singular of the premodifier has a different meaning.

Greenbaum & Quirk give 'the arms race' as an example—where 'arm' has a completely different meaning—while Sabin's examples of descriptive premodifiers sound similarly unsuitable in the singular, though more subtly so (sometimes through the removal of the 's' making the premodifier into a different part of speech): 'sale effort', 'saving account', 'new release' and 'earning record'.

So this may be a useful test for linguists, but it's not a particularly simple one. In fact, better advice to beginners and non-native English speakers may be to 'unpack' the phrase. In any case, multiple noun modifiers aren't in keeping with plain language, and restructur-

ing (and perhaps simplifying) these types of phrase may remove the whole apostrophe dilemma. For example, why not say 'blacklist of construction workers'?

If you do decide to be brave and keep a noun with a regular plural as a premodifier, then you'll need to think carefully about the intended meaning, and apostrophise (or not) accordingly. At least then you'll have the peace of mind of knowing you can justify your choice if anyone challenges you on it. And remember too that with interpretation of meaning comes subjectivity, which means neither can be unarguably right—or therefore wrong.

The only exception is in names, where we must accept the preference of the organisation, product or publication, however unsatisfactory we may find it. In the idealism of youth, I devoted much energy to the Save Bart's Apostrophe campaign (a singularly clear-cut case, it may appear): my hair is greying, while Barts Hospital it remains.

**Sarah Carr** has a first degree in modern languages and English, and an MBA. She has worked as a general manager in the National Health Service, and as a fellow at the University of Manchester. Sarah is now a plain-English consultant ([www.carrconsultancy.co.uk](http://www.carrconsultancy.co.uk)) and freelance associate of Plain Language Commission ([www.clearest.co.uk](http://www.clearest.co.uk)). Sarah's publications include 'Tackling NHS Jargon: getting the message across' (Radcliffe Medical Press, 2002).

To subscribe to Pikestaff (it's free), please visit <http://clearest.co.uk/?id=49>.

If you'd like to write for this column or its twin, Legal Lingo for Linguists, please contact Julie Clement, Clarity's editor in chief.

## Conference News

### **The 2012 Clarity Conference: Washington DC, National Press Club**

Clarity's fifth international conference will be held in 2012 from May 21–23 at the National Press Club, a unique venue in Washington DC. Clarity will co-host the conference with the Center for Plain Language ([www.centerforplainlanguage.org](http://www.centerforplainlanguage.org)) and Scribes—The American Society of Legal Writers (<http://www.scribes.org/>).

#### **Theme and focus**

The conference will celebrate the US Plain Writing Act. We will explore the strategies that people everywhere are using to implement plain language. US government agencies that will be there to discuss their programs include the Internal Revenue Service and the Department of Homeland Security. Read about the Act at <http://centerforplainlanguage.org/plain-writing-laws/plain-writing-act-of-2010/>.

#### **Program**

The conference program will feature the usual wide range of speakers and topics. We will have high-profile speakers from both the US and abroad addressing legally-relevant topics including financial disclosure, legislative drafting, jury instructions, clarity in balloting, court rules, international standards for plain language, benefits of plain language for lawyers, and a summary of plain language legislation around the world. For updates to the program and other conference information, visit the conference website at <https://sites.google.com/site/claritydc2012/>.

The conference schedule will run as follows:

- Monday May 21—evening welcome reception;
- Tuesday May 22—all day conference sessions;
- Tuesday May 22—evening dinner; and
- Wednesday May 23—all day conference sessions.

#### **Dinner and ClearMark Awards**

The conference dinner will be on the evening of May 22 at the National Press Club at 7 pm

with a reception at 6 pm. In addition to the dinner speaker, the Center for Plain Language will present its annual ClearMark awards during the dinner. The ClearMark Awards—now in their third year—celebrate some of the best documents in the United States, and poke some gentle fun at some of the worst. To read more about the awards and see some previous winners, visit <http://centerforplainlanguage.org/awards/>. You can also submit entries (open through March 3) from that same page.

The Clarity Band—our editor, Julie Clement, and her husband, Rush Clement—will perform after the dinner. If the dancing at our conference in Lisbon, Portugal is anything to go by, then the Clarity Band is reason alone to be at the conference and dinner.

### Hotel

We have arranged discounted rooms at The Capital Hilton Hotel. The hotel is just two blocks from the White House and five blocks from the conference venue, the National Press Club.

To get the hotel discount, you need to reserve a room by April 20. Provide:

- the group name = Clarity Conference
- the group code = NPS.

Reserve by phone on 1-800-HILTONS or online at [http://www.hilton.com/en/hi/groups/personalized/D/DCASHHH-NPS-20120520/index.jhtml?WT.mc\\_id=POG](http://www.hilton.com/en/hi/groups/personalized/D/DCASHHH-NPS-20120520/index.jhtml?WT.mc_id=POG)

### Early bird discount—conference fee

The conference fees (in US\$) are:

- for government employees and members of Clarity, the Center, or Scribes, \$450, but if you book before March 1, the fee is only \$400; and
- for others, \$500, but if you book before March 1, the fee is only \$450.

Register online for the conference at <http://www.natalieshear.com/clarity/>

Help us spread the word about the Conference to your friends and associates. If you are interested in helping sponsor the conference (we always need help with sponsorships) or would like to place an ad in the conference program, email Christopher Balmford at [christopher.balmford@cleardocs.com](mailto:christopher.balmford@cleardocs.com).

## Message from the President

Thank you to all who took part in the Clarity survey this year. I am pleased to share the highlights with you now, with a detailed analysis in the next Clarity newsletter.



Unsurprisingly, 68% the 134 members who took the survey want Clarity to retain its focus on legal issues. Almost 95% feel that Clarity membership is valuable for sharing experiences and advice with other practitioners.

Over 75% of you feel plain-language standards are important. But you are split over whether to certify plain-language practitioners: 40% of you say it is not important; 40% of you say it is important. The balance is indifferent.

While over 60% of you do not want Clarity to be incorporated, close to 64% of you want the power to approve the constitution. This indicates strong support for developing a constitution, even if Clarity is not incorporated at this stage. (We may have to review this in view of funding and tax.) As a next step, the Constitutional sub-committee will discuss the nature of that Constitution.

You can find the full survey results in three parts at: <http://claritysurvey.wufoo.eu/reports/clarity-international-survey-part-1-of-3/>.

I wish you well over the festive season and look forward to seeing you at the conference in Washington. It promises to be outstanding. For more information, see page 34.

Warm regards

Candice Burt  
President of Clarity



# Join us in Washington, DC!

Register at [www.natalieshear.com/clarity](http://www.natalieshear.com/clarity)

To stay in touch go to [www.facebook.com/clarity.international](http://www.facebook.com/clarity.international)

Conference dinner includes:

The Center for Plain Language's ClearMark Awards 2012

presentation at the National Press Club, Washington, DC, on Tuesday, May 22.

To receive a preferential hotel booking rate

at the Capital Hilton Hotel, mention promotional code: NPS

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