Answering the Critics of Plain Language

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The price that any movement pays for even modest success is that critics emerge. Critics can be healthy for a movement. They can correct error, temper excesses, and prompt the kind of reflection that deepens understanding. So it's probably a sign of progress that there is debate about the movement for plain legal language.

Still, some of the criticism has become stale and should at last be put to rest. The old criticism is, in essence, that we either should not or cannot write in plain language: should not, because it debases the language; and cannot, because of the overriding demands of precision. I have looked at these misconceptions elsewhere.[1] So have other writers.[2] But since the old misconceptions linger, I'll try to dispel them again here.

Meanwhile, there's a new criticism that deserves a longer look. The new criticism is, in essence, that plain language doesn't matter: its approach to communication is too narrow, and there is no empirical evidence that it improves comprehension. These are serious criticisms, and to explain why they are mistaken will require some exploring.

The Old Criticism

The old criticism of plain language has come mainly from within the legal profession. Again, these critics say that plain-

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[1] Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 THOMAS M. COOLEY L. REV. 1, 19-22 (1992).

[2] *See, e.g.*, BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 7-15 (1991); LAW REFORM COMM'N OF VICTORIA, PLAIN ENGLISH AND THE LAW 45-52 (1987; repr. 1990); Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 559-67 (1984–1985).

language advocates want baby talk or a drab, simplified version of English. (I hear it from some of my own colleagues.) Either that, or the critics argue that the need to express complex ideas precisely makes plain language impossible.[3]

One last stab at the old criticism:

1. *Plain language is not anti-literary, anti-intellectual, unsophisticated, drab, ugly, babyish, or base.*

Plain language has to do with clear and effective communication — nothing more or less. It does, though, signify a new attitude and a fundamental change from past practices.

If anything is anti-literary, drab, and ugly, it is traditional legal writing — four centuries of inflation and obscurity. In his groundbreaking book, David Mellinkoff describes it as wordy, unclear, pompous, and dull.[4] Lawrence Friedman agrees: "The fact is that legal writing, as it pours out of thousands of word-processors, is overblown yet timid, homogeneous, and swaddled in obscurity. The legal academy is positively inimical to spare, decent writing."[5] John Lindsey adds that lawbooks are "the largest body of poorly written literature ever created by the human race."[6] Of course, the law has had its share of fine stylists; but it has been overwhelmed by legalese. And the costs must be enormous.[7]

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[3] *See, e.g.*, KAREN LARSEN, THE MISS GRAMMAR GUIDEBOOK 68-69 (1994) (in other respects, a good book); Jack Stark, *Should the Main Goal of Statutory Drafting Be Accuracy or Clarity?*, 15 STATUTE L. REV. 207 (1994).

[4] DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 24 (1963).

[5] Lawrence M. Friedman, *How I Write*, 4 SCRIBES J. LEGAL WRITING 3, 5 (1993).

[6] John M. Lindsey, *The Legal Writing Malady: Causes and Cures*, N.Y. L.J., Dec. 12, 1990, at 2.

[7] *See infra* note 82 (citing efforts to demonstrate those costs — the product of confusion, frustration, and error — and to measure the value of clearer public documents).

The heritage of plain English is just the opposite, as Bryan Garner explains: "It is the language of the King James Version of the Bible, and it has a long literary tradition in the so-called Attic style of writing."[8] Plain English is the style of Abraham Lincoln, and Mark Twain, and Justice Holmes, and George Orwell, and Winston Churchill, and E.B. White. Plain words are eternally fresh and fit. More than that, they are capable of great power and dignity: "And God said, Let there be light: and there was light. And God saw the light, that it was good."[9]

As for the notion that plain language is unsophisticated, once again just the reverse is true. It is much harder to simplify than to complicate. Anybody can take the sludge from formbooks, thicken it with a few more provisions, and leave it at that. Only the best minds and best writers can cut through. In short, writing simply and directly only *looks* easy. It takes skill and work and fair time to compose — all part of the lawyer's craft.

2. *Most of the time, clarity and precision are complementary goals.*

The title of a recent law-review article perfectly captures the stubborn myth that precision is incompatible with plain (or clear) language: "Should the Main Goal of Statutory Drafting Be Accuracy or Clarity?"[10] The truth is that drafters usually do not have to choose between one or the other: "the instances of actual conflict are much rarer than lawyers often suppose."[11] What's more, by aiming for both, the drafter will usually improve both:

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[8] BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 664 (2d ed. 1995).

[9] *Genesis* 1:3-4.

[10] Stark, *supra* note 3.

[11] GARNER, *supra* note 8, at 663.

> The purposes of legislation are most likely to be expressed and communicated successfully by the drafter who is ardently concerned to write clearly and to be intelligible. The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood, . . . requires the unremitting pursuit of clarity by drafters. Clarity . . . requires simplicity and precision.
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> . . .
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> The blind pursuit of precision will inevitably lead to complexity; and complexity is a definite step along the way to obscurity.[12]

Typically, the critics argue their case by offering definitions of technical terms, like *standardized valuation per person* and *motor fuel*.[13] This argument is not convincing. Plain-language advocates have said repeatedly that technical terms and terms of art are sometimes necessary, and that some legal ideas can be stated only so simply. But technical terms and terms of art are only a small part of any legal document — less than 3% in one study.[14] This hardly puts a damper on plain language.

Nor is it any real criticism that occasionally a plain-language version might miss a point or make a mistake. Here is what the Law Reform Commission of Victoria said about one of their projects:

> If some detail has been missed, it could readily be included without affecting the style of the plain English version. It would not be necessary to resort to the convoluted and repetitious style of the original, nor to introduce the unnecessary concepts which it contains. Any errors in the plain English version are the result of difficulties of translation, particularly difficulties in understand-

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[12] G.C. THORNTON, LEGISLATIVE DRAFTING 52-53 (4th ed. 1996).

[13] Stark, *supra* note 3, at 212.

[14] Benson Barr et al., *Legalese and the Myth of Case Precedent*, 64 MICH. B.J. 1136, 1137 (1985); *see also* Benson, *supra* note 2, at 561 ("a small island of true terms of art"); Stanley M. Johanson, *In Defense of Plain Language*, 3 SCRIBES J. LEGAL WRITING 37, 39 (1992) ("the small subcategory comprising terms of art").

> ing the original version. They are not inherent in plain English itself. Ideally, of course, plain English should not involve a translation. It should be written from the beginning.[15]

What is the point, after all, of being precise but unclear? The result is what Robert Benson calls "unintelligible precision."[16] It makes about as much sense as precise mud. And besides, this whole debate assumes that traditional legal writing is precise to begin with — a dubious assumption.[17]

Of course, legal writers must aim for precision. But plain language is an ally in that cause, not an enemy. Plain language lays bare the ambiguities and uncertainties and conflicts that traditional style tends to hide. At the same time, the process of revising into plain language will often reveal all kinds of unnecessary detail.[18] In short, you are bound to improve the substance — even difficult substance — if you give it to someone who is devoted to being intelligible.

One critic who downplays intelligibility makes these two revealing statements — one of them cavalier and the other one insular:

> If [legislative drafters] write a statute that is not rapidly comprehensible but fulfils the requester's intent, they have done their

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[15] PLAIN ENGLISH AND THE LAW, *supra* note 2, at 49.

[16] Benson, *supra* note 2, at 560.

[17] *See* GARNER, *supra* note 8, at 580 (describing "the myth of precision"); MELLINKOFF, *supra* note 4, at 388 (concluding that the language of the law has only a "nubbin of precision"); Benson, *supra* note 2, at 560 ("[T]here is relatively little precision, intelligible or unintelligible, in legal language."); Robert D. Eagleson, *Plain English — A Boon for Lawyers*, THE SECOND DRAFT (Legal Writing Institute), Oct. 1991, at 12, 12-13 ("[T]raditional legal language is not a security against imprecision [but rather] provides a ready cover for imprecision.").

[18] *See* PLAIN ENGLISH AND THE LAW, *supra* note 2, at 29-33 (illustrating the problem of "unnecessary concepts"); Kimble, *supra* note 1, at 17 (illustrating "the self-defeating overprecision and overelaboration that legal documents are so prone to").

> job, although they will slow down readers, which is a trivial consideration.[19]
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> . . .
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> [L]egislative drafters will get help in advancing their art from advocates of focusing on accuracy, not from advocates of focusing on clarity. . . . Also, major help will come not from academics, who not only are likely to be wedded to the plain language school but also have insufficient knowledge of the exigencies of drafting, but from professional legislative drafters. It is time for drafters to fill the vacuum into which the academics have rushed, to take responsibility for developing their own art.[20]

First of all, many of the academics who support plain language have done a good deal of legislative drafting.

Second, the vast majority of plain-language advocates are not academics at all. They are lawyers who draft legal documents for a living, under pressure. The proof is in the membership list of Clarity, an international organization that studies and promotes plain language.[21]

Third, the author — like many other critics of plain language — seems to be unaware of the plain-language literature and the extent of plain-language activities around the world. The argument that it can't be done, or done accurately, is answered by the fact that it is being done, by people with the will and the skill to do it. Here are some examples that involve legislative drafting alone (if only more of them were from the United States!):

- In Australia, the Law Reform Commission of Victoria redrafted Victoria's complex Takeovers Code. They cut it by

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[19] Stark, *supra* note 3, at 209.

[20] *Id.* at 213.

[21] Available from Mark Adler, 74 South Street, Dorking, Surrey RH4 2HD, England.

almost half. And the redraft was checked and rechecked for accuracy by substantive experts.[22]

- The Parliamentary Counsel of Queensland and of New South Wales have publicly endorsed a plain-language style of drafting.[23]
- A Commonwealth Inquiry into Legislative Drafting released a report saying that "the plain English style developed by the drafting agencies since the mid-1980s has made new Commonwealth legislation much easier to understand."[24] The report sets out a series of recommendations to further improve the process and style of legislative drafting.
- Recently, the organization that represents all Australian road authorities drafted a proposed new set of uniform national road laws. They are "written in plain English to make them easy to understand."[25] They come complete with colored diagrams. And they have been approved by the Office of Legislative Drafting (the Commonwealth agency that writes regulations), which was involved in the drafting.
- In New Zealand, the New Zealand Law Commission has endorsed a plainer style of legislative drafting.[26]

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[22] PLAIN ENGLISH AND THE LAW, *supra* note 2, app. 2 (Takeovers Code). The figure of reducing the original legislation by almost half comes from David St. L. Kelly, *Plain English in Legislation: The Movement Gathers Pace*, in ESSAYS ON LEGISLATIVE DRAFTING 57, 57 (David St. L. Kelly ed., 1988).

[23] OFFICE OF THE QUEENSLAND PARLIAMENTARY COUNSEL, ANNUAL REPORT 1992–1993, at 2-3 (1993); PARLIAMENTARY COUNSEL'S OFFICE & CENTRE FOR PLAIN LEGAL LANGUAGE, A DISCUSSION PAPER: REVIEW AND REDESIGN OF NEW SOUTH WALES LEGISLATION 3, 9 (1994).

[24] HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, CLEARER COMMONWEALTH LAW at xxii (1993).

[25] AUSTROADS, PROPOSED AUSTRALIAN ROAD RULES, Preface (1995).

[26] NEW ZEALAND LAW COMM'N, REPORT NO. 17, A NEW INTERPRETATION ACT: TO AVOID "PROLIXITY AND TAUTOLOGY" 4-5 (1990); REPORT NO. 27, THE FORMAT OF LEGISLATION (1993); REPORT NO. 35, LEGISLATION MANUAL: STRUCTURE AND STYLE 33-40 (1996).

- Also in New Zealand, the government is rewriting the Income Tax Act. The new act will be written in plain language — including everything from a better structure to the use of formulas, tables, and flowcharts — as a way to save administrative costs and compliance costs.[27]
- In South Africa, the Ministry of Justice is starting a drive to write laws and government forms in plain language — as part of a commitment to democracy and access to justice.[28]
- In Sweden, the Ministry of Justice has a Division for Legal and Linguistic Draft Revision, consisting of lawyers and linguists. This division reviews all draft statutes and converts them into plain Swedish, advises committees that are working on redrafting projects, gives training seminars for drafters, and prepares influential models and guidelines.[29]
- In England, Martin Cutts, a writing consultant, redesigned and rewrote an act of Parliament, the Timeshare Act 1992. He cut it by about 25% and improved the comprehensibility.[30]
- In Canada, several federal agencies have created a partnership to develop a process for drafting in plain language. As part of a pilot project, they redrafted the Consumer Fireworks Regulations, consulted with typical users about the redraft, tested it on typical users, and then revised it. They concluded that although this process might involve some short-term costs, it would produce a number of long-term benefits and savings.[31]

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[27] INLAND REVENUE DEP'T, REWRITING THE INCOME TAX ACT: OBJECTIVES, PROCESS, GUIDELINES — A DISCUSSION DOCUMENT 6-10, 19-38 (1994).

[28] Dullah Omar, *Plain Language, the Law and the Right to Information*, CLARITY NO. 33, July 1995, at 11.

[29] Barbro Ehrenberg-Sundin, *Plain Language in Sweden*, CLARITY NO. 33, July 1995, at 16.

[30] MARTIN CUTTS, LUCID LAW §§ 1.7, 1.12, 8.28 (1994).

[31] SHELLEY TREVETHAN ET AL., DEP'T OF JUSTICE, WORKING DOCUMENT: CONSUMER FIREWORKS REGULATIONS — FINAL REPORT at v (1995).

- In the United States, the federal rules of civil procedure, criminal procedure, and appellate procedure are now being drafted according to plain-language principles.[32]
- Back in Australia, a four-member task force, including a legislative drafter and a plain-language expert, has rewritten part of Australia's Corporations Law under an express mandate to simplify it. Among many other things, their new version cuts one main section from 15,000 words to 2,000 words, eliminates many unnecessary requirements, and redesigns and reorganizes the entire text for easier access. Throughout the process, the various drafts were tested (23 testing sessions) on a wide range of potential users. And the proposed bill was submitted for public comment before it was introduced.[33]

Note the last item. What a revolutionary way to draft major legislation.

The time has passed, you'd think, when legislative drafters should argue that their only audience — or even primary audience — is the legislator who requests a law or the judge who may interpret it. What about those who have to read it because they are directly affected, such as administrators and professional groups? What about citizens who might wish to read it because it affects their lives? Do we discount them as merely secondary or as incapable of delving into such priestly matters?

The better view is expressed by the Parliamentary Counsel of New South Wales: "The ordinary person of ordinary intelligence and education [should] have a reasonable expectation of understanding . . . legislation and of getting the answers to the questions he

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[32] Kimble, *supra* note 1, at 41; *see also* BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996).

[33] HOUSE OF REPRESENTATIVES, FIRST CORPORATE LAW SIMPLIFICATION BILL 1994 — EXPLANATORY MEMORANDUM 4-8 (1994).

or she has. This is of critical importance."[34] Certainly, we have to recognize the political and employment realities that drafters face. Yet we can fairly ask them to be informed and open-minded and to consider what steps they could take together to begin changing old attitudes about in-group drafting.

Let me sum up the debate over the old criticism with an exchange of letters (one of them mine) that appeared not long ago in the *Michigan Bar Journal*.[35]

> To the Editor:
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> Andrew Tierman's article [in an earlier issue] was the most refreshing piece I have read in years. I, as he, believe that the Plain English Jihad has marched beyond removing archaic usage to militarily enforcing politically correct "bad English."
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> I was dismayed in a recent negotiation when attorneys for a major company refused to properly use the possessive form of their own company's name. This dumbing down made the documents more difficult to understand with no apparent benefit (except to illiterate document drafters).
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> English has and will continue to evolve, but it will suffer if zealots forbid the use of its flavor and precision. I do not look forward to a day of bland, two-syllable words and five-word sentences.

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[34] Dennis Murphy, *Plain Language in a Legislative Drafting Office*, CLARITY NO. 33, July 1995, at 3, 5; *see also* PLAIN ENGLISH AND THE LAW, *supra* note 2, at 50, 51 (stating that the "law should be drafted in such a way as to be intelligible, above all, to those directly affected by it"; and that, while laws cannot always be made intelligible to the average citizen, "every effort [should] be made to make them intelligible to the widest possible audience").

[35] 73 MICH. B.J. 886; 73 MICH B.J. 1146 (1994) (the citations in my letter following the prescribed Michigan form).

To the Editor:

I can't let pass the letter from [X] in the September issue of the *Bar Journal*. He sets a new record for distorting the plain-language movement.

What's discouraging is that we have addressed these criticisms so many times:

- Plain language has nothing to do with political correctness.
- Plain language has nothing to do with enforcing what Mr. [X] calls "bad English." What a strange notion. And in the example he uses, he is wrong to suggest that company names always require the possessive form. Sabin, *The Gregg Reference Manual* (7th ed), § 640, p 154.
- We do not "forbid the use of flavor and precision." Of course not. On the other hand, we don't find much flavor or precision in *Further affiant sayeth not*. With all the talk about flavor and precision, you might think there's a lot of it around. But see Garner, *A Dictionary of Modern Legal Usage*, "The Myth of Precision," p 369.
- We do not insist on "two-syllable words and five-word sentences." Rather, the guidelines that we suggest are flexible and varied; they range over planning, design, organization, sentences, words, and testing. See Kimble, *Plain English: A Charter for Clear Writing*, 71 Mich BJ 1190, 1192 (November 1992). We do think that good legal writers are moving toward a simpler, more direct style — and away from the archaic, turgid, obscure writing that has brought criticism on our profession for centuries.
- There is strong evidence that traditional legal writing does not communicate well; that plain language improves understanding; that readers — including judges and lawyers — prefer plain language and prefer it overwhelmingly; and that plain language saves time and money. *Id.*, pp 1304-1305 (December 1992).
- There are many demonstration projects showing that legal documents, even complex ones, can be written in plain language without a loss of accuracy or precision.

Change is hard — especially when it has to keep overcoming myths and misconceptions.

The New Criticism

The new criticism of plain language comes mainly from outside the legal profession. Robyn Penman, from the Communication Research Institute of Australia, argues that there is no hard evidence that plain language improves comprehension; that plain-language advocates tend toward a narrow, text-based (instead of reader-based) approach to communication; that the only way to be sure whether readers understand a document is to test it on the readers; and that plain language will not reduce litigation because the very essence of law is interpreting words.[36]

My response to Penman and the new criticism:

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

   - Some of the pioneering research into plain language was done by the Document Design Center (now the Information Design Center) of the American Institutes for Research, in Washington, D.C. Among its early publications, in 1981, was *Guidelines for Document Designers*, by Daniel Felker, Janice Redish, and others. This book set out 25 guidelines for clearer communication, and each one included references to the supporting research.
   - In a study of jury instructions that were presented to jurors orally, the plain-language versions improved comprehension from 45% to 59%, for an improvement of about 31% over the original.[37]

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[36] Robyn Penman, *Unspeakable Acts and Other Deeds: A Critique of Plain Legal Language*, 7 INFO. DESIGN J. 121 (1993).

[37] Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1333, 1370 tbl. 14 (1979).

- In another study of some of the same instructions, but this time given orally and in writing, readers understood the plain-language versions "almost fully."[38]
- In still another study of jury instructions — two different sets — plain language improved the level of comprehension from 51% and 65% to 80% on both sets.[39]
- In a study of medical-consent forms, readers of the original form were able to correctly answer 2.36 questions out of 5; on the revised form, they could answer 4.52 questions out of 5, for an improvement of 91%. In addition, the mean response time improved from 2.65 minutes to 1.64 minutes.[40]
- In a study of legislation by the Law Reform Commission of Victoria, lawyers and law students comprehended plain-language versions of the legislation in half to a third of the mean time needed to comprehend the original versions.[41]
- In a study of four different legal documents, plain-language techniques reduced the number of reader errors on three of them by about half. On the fourth document, an insurance policy, errors increased. But after further study and revision, including the use of examples (which plain-language experts have long recommended), readers made fewer errors on the insurance policy as well.[42]

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[38] Benson, *supra* note 2, at 546 (noting that "oral jury instructions are likely never to be understood adequately").

[39] AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 45-46 (1982).

[40] David S. Kaufer et al., *Revising Medical Consent Forms: An Empirical Model and Test*, 11 LAW, MED. & HEALTH CARE 155, 161 (1983).

[41] PLAIN ENGLISH AND THE LAW, *supra* note 2, at 69-70.

[42] Joyce Hannah Swaney et al., *Editing for Comprehension: Improving the Process Through Reading Protocols*, in PLAIN LANGUAGE: PRINCIPLES AND PRACTICE 173, 177, 185 (Erwin R. Steinberg ed., 1991).

- In another study of various legal documents, plain language improved comprehension by 140%, from 15% to 36%, in one test; and by 31%, from 50.5% to 66%, in another test.[43]
- In a study of a mortgage by the Centre for Plain Legal Language at the University of Sydney, law graduates improved their accuracy on the plain-language version by 15%, from 66% to 76%.[44]
- In a new study involving the Centre, the authors collected data on several forms, including an application for divorce. For persons who filled it out themselves, their completion rate increased from 52% to 67% on the plain-language version; the number of applications rejected because of errors fell from 42% to 8%; and the average number of errors fell from 1.74 to .14.[45]
- In a study of an office manual concerning an insurance product, staff members were given a fixed time to answer questions using the original manual and a plain-language version. On the original version, they averaged 3.2 questions right; on the plain-language version, they averaged 6.6 questions right, for an improvement of 106%.[46]
- In his study of legislation, Martin Cutts tested his Clearer Timeshare Act 1993 on superior law students. Their overall performance on 12 questions improved slightly, from 87% correct to 91%. But on one question, central to understanding

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[43] Michael E.J. Masson & Mary Anne Waldron, *Comprehension of Legal Contracts by Non-Experts: Effectiveness of Plain Language Redrafting*, 8 APPLIED COGNITIVE PSYCHOL. 67, 75, 77 (1994).

[44] CENTRE FOR PLAIN LEGAL LANGUAGE, PAPER NO. 1, SURVEYING A PLAIN LANGUAGE MORTGAGE 3 (1992).

[45] GORDON MILLS & MARK DUCKWORTH, CENTRE FOR PLAIN LEGAL LANGUAGE, CENTRE FOR MICROECONOMIC POLICY ANALYSIS & LAW FOUNDATION OF NEW SOUTH WALES, THE GAINS FROM CLARITY at v, 26-30 (1996).

[46] Australian Mutual Provident, Documentation Quality Improvement Team 10 (1992) (unpublished internal study, on file with author).

the scope of the act, they improved from 48% correct to 94%.[47]

- In a 1980 study of an administrative rule by the Document Design Center, inexperienced readers of the original rule got an average of 8.54 questions right out of 20; on the plain-language version, they got an average of 17.26 questions right, for an improvement of 102%. Even experienced readers of the rule improved by 29%. In addition, the average response time improved from 2.97 minutes to 1.62 minutes.[48]
- In a recent study of a tax form by the Document Design Center, the percentage of users who performed well on the revised form increased from 10% to 55%, for an improvement of 450%.[49]

You'll notice that in some of these studies the level of comprehension remained lower than the revisers might have hoped. That serves to remind us: revising documents is difficult work involving many variables, there are limits to the level of comprehension we can expect with legal documents, and we still have a lot to learn.

But the fact remains that there *is* evidence to show that plain language improves comprehension. What's more, it *is* a substantial gain to move from 10% to 55%, or from 51% to 80%, or even from 50% to 66%. Finally, what no study can easily measure is motivation — that is, the number of readers who don't even try to understand, say, a traditional mortgage because they can tell in one look that they don't stand a chance.

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[47] CUTTS, *supra* note 30, §§ 1.7, 8.28.

[48] JANICE C. REDISH, HOW TO WRITE REGULATIONS AND OTHER LEGAL DOCUMENTS IN CLEAR ENGLISH 43 (1991).

[49] Anita D. Wright, *The Value of Usability Testing in Document Design*, CLARITY NO. 30, Mar. 1994, at 24, 30.

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

The new critics flirt with distortion when they characterize plain language.

First, they distinguish between a "text-based approach" to plain language and a "reader-oriented approach."[50] The text-based approach, they say, relies merely on language — words and sentences. The reader-oriented approach relies on testing readers to make sure that they understand and can use the document.

Then the critics make all the old arguments against text-based guidelines: long sentences can be managed; there can be good reasons to use the passive voice; shorter does not always mean clearer; readability formulas are only a rough measuring device; and so on.[51]

But these are all nonissues. Every reputable book on plain language recognizes, for instance, the good uses of the passive voice.[52] The language guidelines, the ones for words and sentences, are just that — guidelines, not inflexible rules. And guidelines are not only useful to writers, but essential to the writing process. All writers use guidelines, whether they realize it or not — either explicit guidelines or ones they have internalized.[53]

The important point is that plain language cannot be confined to a "text-based approach." In one breath, the critics seem to acknowledge this;[54] but in another breath, they speak of "the

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[50] Penman, *supra* note 36, at 122-26.

[51] *Id.* at 123-24.

[52] *See, e.g.*, MARK ADLER, CLARITY FOR LAWYERS: THE USE OF PLAIN ENGLISH IN LEGAL WRITING 41 (1990); ROBERT D. EAGLESON, WRITING IN PLAIN ENGLISH 47 (1990); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 31 (3d ed. 1994).

[53] Janice C. Redish & Susan Rosen, *Can Guidelines Help Writers?*, in PLAIN LANGUAGE: PRINCIPLES AND PRACTICE, *supra* note 42, at 83, 86-87.

[54] *See* Penman, *supra* note 36, at 125 ("An increasing number of plain language advocates are recognising the importance of the reader in developing plain language documents.").

typical text-based claims of the plain English movement" and "the basic, text-based tenets of the plain language movement."[55] Unfortunately, they are ignoring the overwhelming weight of the plain-language literature.

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

Once more: the plain-language movement should not be identified with one approach as opposed to another. We have learned from the commentators and researchers, from our own research, and from our work in rewriting documents. And in any number of books and articles, we have set out dozens of guidelines for plain language — guidelines that range over planning, design, organization, sentences, words, and testing.[56]

In addition, we recognize that the guidelines may vary according to the intended readers and how they will use the document. So for documents that organizations or the larger public will use, plain language involves — ideally — a process of developing the documents to meet the users' needs.[57]

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[55] *Id.* at 124, 127; *see also* Matthew J. Arnold, *The Lack of Basic Writing Skills and Its Impact on the Legal Profession*, 24 CAP. U. L. REV. 227, 247-50 (1995) (equating plain language with mere "jargon-slaying").

[56] *See, e.g.*, MICHELE M. ASPREY, PLAIN LANGUAGE FOR LAWYERS (2d ed. 1996); EAGLESON, *supra* note 52; PLAIN ENGLISH CAMPAIGN, THE PLAIN ENGLISH STORY (3d rev. ed. 1993); REDISH, *supra* note 48; REVIEW AND REDESIGN OF NEW SOUTH WALES LEGISLATION, *supra* note 23; David St. L. Kelly & Christopher J. Balmford, *Leading the Way in Developing Plain English Documents*, AUSTL. INS. INST. J., Sept. 1993, at 43, 45-46; Kimble, *supra* note 1, at 11-14; Susan Krongold, *Writing Laws: Making Them Easier to Understand*, 24 OTTAWA L. REV. 495 (1992).

[57] Janice Redish, *Reply to Robyn Penman*, RAPPORT NO. 12, Summer 1994, at 8.

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

This is another nonissue. The new critics proclaim that "[a] proper reader-oriented approach would test the actual documents on potential readers and modify the documents accordingly."[58] But again, the plain-language literature is strongly on the side of testing.[59] The Document Design Center has been stressing it for 15 years.[60] The Plain English Campaign, in England, has also been involved in testing for years.[61]

Now there's more to say about testing documents than I can say here, and more to know about it than anybody knows today. It is a field of its own, with a growing literature.[62]

The results of testing will obviously depend on many variables: the type of test, the complexity of the subject, the experience and ability of the readers, the skill of the writer or reviser, and more. And almost by definition, the degree of improvement on a revised document will depend on how well the original scores: the higher the results, the less room there is for improvement. Finally, because there *are* limits to the level of comprehension we can expect with legal documents, our goals must be reasonable.

Consider, for instance, one study of a complex document, a disability-income insurance policy. The testers identified situations in which, according to industry experts, policyholders regularly misunderstood their benefits. Using multiple-choice questions about those situations and a plain-language policy, the testers aimed for

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[58] Penman, *supra* note 36, at 126.

[59] *See supra* notes 37–49, 56 and accompanying text.

[60] *The Process Model of Document Design*, SIMPLY STATED NO. 18, July 1981, at 1, 4.

[61] THE PLAIN ENGLISH STORY, *supra* note 56, at 21, 51.

[62] *See, e.g.*, JOSEPH S. DUMAS & JANICE C. REDISH, A PRACTICAL GUIDE TO USABILITY TESTING (1993); EAGLESON, *supra* note 52, at 80-83; Krongold, *supra* note 56, at 544-48; Wright, *supra* note 49.

a score of at least 70% right on each question — a goal that readers achieved on six of ten questions.[63]

After writing most of this article, I tested before-and-after versions of two documents, a contract and a statute. The contract has been used by a Michigan state agency for work done for the agency by independent contractors. I rewrote it into plain (or plainer) language and checked it for accuracy with the agency's director. The statute is a South African statute redrafted as part of a demonstration project for that country's new Ministry of Justice.

To test both documents for comprehensibility, my research assistant prepared two sets of multiple-choice questions, 14 questions for the contract and 21 for the statute.

In the appendix to this article is an example, from the contract, of a before-and-after provision and a question. Also included is the script that I read at the beginning of each test. As you can see, I tried to test for accuracy and for speed. With the statute, I also asked participants to rate how difficult they thought the exercise was — a kind of frustration index.

I tested the contract on 27 members of the agency staff, most of whom had never used the contract (the few who had, I split up evenly). I also tested it on 38 second- and third-year law students. I tested the statute on 43 other law students, mostly first-year students, who signed up voluntarily after I posted a notice. Finally, I tested the statute on 24 members of a law-school staff (an educated public; they averaged three years of college). For each test, half the readers randomly got the original version of the document and half got the plain-language version.

Here are the results — which you can add to the others listed earlier:

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[63] DAVID ST. L. KELLY & CHRISTOPHER J. BALMFORD, SIMPLIFYING DISABILITY INCOME INSURANCE DOCUMENTS 70 app. at 2, 10-20 (1994) (the authors then used the testing to further improve the policy).

Test of Contract on State-Agency Staff

	Original	Plain Language
Overall % of correct answers (accuracy)	53.6	78
Average minutes to answer all questions (speed)	14.8	12.4

Improvement in accuracy: 45.5%
Improvement in speed: 16.2%

Test of Contract on Law Students

	Original	Plain Language
Overall % of correct answers (accuracy)	65.6	81
Average minutes to answer all questions (speed)	15.7	12.6

Improvement in accuracy: 23.5%
Improvement in speed: 19.7%

Test of Statute on Law Students

	Original	Plain Language
Overall % of correct answers (accuracy)	59.9	70
Average minutes to answer all questions (speed)	34.3	32.7
Average rating of difficulty, with 1 = very easy & 10 = very hard (perceived ease)	6.3	3.7

Improvement in accuracy: 16.9%
Improvement in speed: 4.7%
Improvement in ease: 41.3%

Test of Statute on Law-School Staff

	Original	Plain Language
Overall % of correct answers (accuracy)	55.6	67.5
Average minutes to answer all questions (speed)	39.7	36.15
Average rating of difficulty, with 1 = very easy & 10 = very hard (perceived ease)	6.75	5

Improvement in accuracy: 21.4%
Improvement in speed: 8.9%
Improvement in ease: 25.9%

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

During most of their days, most lawyers are in their offices — writing. They write letters to their clients, letters to other lawyers, memorandums of law, briefs, lawsuit papers of all kinds (complaints, answers, motions, interrogatories, requests for admissions), transactional documents (contracts, wills, trusts, bylaws), and much more. Obviously, most of these documents cannot be put through rounds of testing on potential readers.

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

In any event, the lawyer must at some point think about design and organization and style. Let's assume that he or she knows better than to just order up the formbook model. Let's also assume that he or she has the skill to write in plain language. What should the lawyer do, sitting there in the office? Consider the evidence and the indicators.

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

Second, traditional style — legalese — fails all the tests and does not communicate, as indicated in 27 pages of detailed analysis by

Robert Benson.[64] Despite the sheer weight and variety of that evidence, the new critics have rejected it because it was not based on testing of readers.[65] But which way does it point, for the lawyer who is making a choice? Would the critics recommend just settling for formbook models?

Third, additional research shows that readers prefer plain language over traditional style.[66] Readers prefer it by a wide margin; they find it substantively more persuasive; and judicial readers assume, ironically enough, that lawyers who use it come from more prestigious firms. But this evidence, too, is dismissed because it does not necessarily prove that readers can better understand what they prefer.

No doubt readers can be wrong in thinking they understand something; they can prefer what they might not really comprehend. But here again, where do you suppose the odds lie? If readers prefer version A to version B, which is more likely to be clear and efficient? Which way should a lawyer write?

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

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

> Know All Men By These Presents: That Pierce Corporation ("Pierce"), a Pennsylvania corporation, in consideration of the sum of $____, and other good and valuable consideration, received in accordance with the terms of a certain letter agreement dated April

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[64] *See* Benson, *supra* note 2, at 531-57.

[65] Penman, *supra* note 36, at 125.

[66] Kimble, *supra* note 1, at 24-25.

> 7, 1993 by and between Pierce and Blue Avenue Associates, a Pennsylvania limited partnership, receipt of which Pierce hereby acknowledges, does hereby remise, release, and forever discharge Blue Avenue Associates and its successors and assigns of and from all, and all manner of, actions and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims, and demands whatsoever in law or equity, arising out of that certain lease commencing October 1, 1992 by and between Pierce and Blue Avenue Associates, which, against Blue Avenue Associates Pierce ever had, now has, or which its successors, assigns, or any of them, hereafter can, shall, or may have, for or by reason of any cause, matter or thing whatsoever, arising on or before the date of this General Release, but reserving all rights with respect to the return of the security deposit held by Blue Avenue Associates.
>
> In Witness Whereof, Pierce Corporation, intending to be legally bound hereby, has executed this General Release on April 28, 1993.

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

> BE IT REMEMBERED that on the 30th day of March, 1993, came on for hearing before this Honorable Court the motion of Plaintiff to Supplement XYZ Corporation's Appendix to Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, and this Court being of the opinion that such Motion is well taken and should be granted, does hereby grant the motion of Plaintiff to Supplement XYZ Corporation's Appendix to Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment.[67]

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

So that no one misunderstands, let me reemphasize the value of testing public documents whenever possible. At the same time, though, most lawyers are not writing major public documents that

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[67] Quoted in CAROL ANN WILSON, PLAIN LANGUAGE PLEADINGS 18 (1996).

can be subjected to testing. So lawyers are left to their own devices. They must fall back on their skills, on their training, on their perceptions and judgment, perhaps on an editor-friend. They have to make choices. And the evidence — scientific, impressionistic, and everything in between — strongly indicates that plain language will be better understood and will save time. It is no guarantee and no panacea. But it is the clear choice.

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

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

When the Document Design Center revised a tax form for the sale of a home, they found that users had the most trouble filling out three items on the form.[68]

First, this item:

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

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

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[68] Wright, *supra* note 49, at 28-29.

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

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

The second item that caused trouble:

> Basis of home sold (see instructions).

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

The third item that caused trouble:

> Subtract line 9f from line 8a.

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

All these changes follow plain-language guidelines or are consistent with them. Even adding detail here and there, adding words in certain places, is no contradiction. In the end, using plain language will usually result in a shorter document.

I don't mean to suggest that every change and technique in every document will find its precise rationale in a plain-language guideline. But I do question the new critics when they say of one of their projects — the "Capita" project — that "[p]lain English was

nowhere in sight" and that their revisions were "not in plain English."[69]

As they report it, the project involved highly technical insurance documents. The success of the project "was due to communication research, design methods, testing, project planning and successful negotiation."[70] But there is nothing here that is foreign to plain language. Next: "The factor which led to the massive improvements in form-filling by Capita agents [was the use of branching structure, or algorithmic form]."[71] Neither is that technique outside the plain-language literature;[72] in fact, the technique appeared in the literature years ago.[73] Finally, some language from a page of the new Capita forms:

> 2 Are there any other policyowners?
>
> No ☐▸ Go to 4
> Yes ☐▸ Give details
>
> [part omitted]

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[69] David Sless, *Plain English Stories*, COMMUNICATION NEWS (Communication Research Institute of Australia), Sept.–Oct. 1993, at 1, 2.

[70] *Id.*

[71] *Id.*

[72] BARBARA CHILD, DRAFTING LEGAL DOCUMENTS 378-80 (2d ed. 1992); David C. Elliott, *Innovative Legislative Drafting*, 73 MICH. B.J. 40, 43 (1994).

[73] Robert W. Benson, *Up a Statute with Gun and Camera: Isolating Linguistic and Logical Structures in the Analysis of Legislative Language*, 8 SETON HALL LEGIS. J. 279, 296-300 (1984) (using the term "decision tree").

3 Are policyowners:

Joint tenants ☐▶ Go to 4
Tenants in common ☐▶ Give % ownership of each

Policyowner 1 %
Policyowner 2 %

First policyowner
as trustee ☐▶ Go to 4[74]

You decide. Isn't this plain language? (*Joint tenant* is a technical term, but insurance agents, the apparent users, would understand it.)

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

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

6. *Plain language would reduce litigation by preventing the unnecessary confusion that traditional legal writing produces.*

We are told that litigation will occur with or without legalese because the essence of law is in the legal interpretation of meaning.[75] To say that, though, is to ignore the unnecessary litigation that poor legal drafting produces.

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[74] PHIL FISHER & DAVID SLESS, COMMUNICATION RESEARCH INSTITUTE OF AUSTRALIA, OCCASIONAL PAPER NO. 10, IMPROVING INFORMATION MANAGEMENT IN THE INSURANCE INDUSTRY: A CASE STUDY OF THE CAPITA FINANCIAL GROUP at 33 (1989).

[75] Penman, *supra* note 36, at 125.

In gauging what we can and cannot prevent, we need to be clear about the difference between vagueness and ambiguity. The law depends to a large extent on vague terms, like *good cause* or *reasonable person* or *gross negligence*. In fact, nearly all terms are vague to some degree; they will always present some uncertainty at the margins, some uncertainty about how they might apply to peculiar facts. (Does *highway* include the shoulder? and so on, endlessly.) Ambiguity, on the other hand, presents an either-or choice, a choice between alternative meanings. Ambiguity is almost always unintended and almost always a sin, but it's always preventable.

Consider just one example.[76] The state wanted to revoke the license of a private investigator who had been convicted of a felony. The felony did not involve dishonesty or fraud. The relevant legislation said:

> (1) The secretary of state may revoke a license issued under this act if the secretary determines, upon good cause shown, that the licensee . . . has
>
> . . .
>
> (c) been convicted of a felony or misdemeanor involving dishonesty or fraud, unauthorized divulging or selling of information . . . .

The question was whether "involving dishonesty or fraud" modified "felony," or just "misdemeanor." The lawsuit wasted the trial court's time, the appellate court's time, their staffs' time, and the government lawyer's time. It could have been easily avoided by listing the items, or by separating or connecting the modifying words:

> (c) been convicted of:
>
> (i) a felony;

[76] Rios v. Department of State Police, 469 N.W.2d 71, 72 (Mich. Ct. App. 1991).

> (ii) a misdemeanor involving dishonesty or fraud;
>
> (iii) unauthorized divulging or selling of information . . . .

Or, with the same meaning:

> (c) been convicted of a misdemeanor involving dishonesty or fraud, a felony, unauthorized divulging or selling of information . . . .

Or, with the alternative meaning:

> (c) been convicted of a felony involving dishonesty or fraud, a misdemeanor involving dishonesty or fraud, unauthorized divulging or selling of information . . . .

The law reports are littered with cases like this one. And who knows how many other cases have been settled before trial, or have been litigated in the trial court but not reported because they were not appealed? In one study of 500 contract cases, the investigators concluded that about 25% of those cases revolved around problems of interpretation and that a good part of the difficulty was directly traceable to incomplete negotiation or poor drafting.[77]

What's more, it's not just ambiguity that causes trouble. David Mellinkoff has cited the volumes of litigation over such jargon as *aforesaid, and/or, herein,* and *whereas.*[78] Then you can add the more than 1,100 cases involving the ubiquitous *shall.*[79] Then you can add the cases caused by unnecessary doublets like *any and all*; and by not using consistent terms — the same word for the same thing; and by not keeping related material together, which some courts call "deceptive placement";[80] and by including so much detail that

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[77] Harold Shepherd, Book Review, 1 J. LEGAL EDUC. 151, 154 (1948).

[78] MELLINKOFF, *supra* note 4, at 305-10, 315, 321-25.

[79] 39 WORDS AND PHRASES 111-65 (1953); *id.* at 56-84 (Supp. 1996).

[80] Yahr v. Garcia, 442 N.W.2d 749, 751 (Mich. Ct. App. 1989).

it becomes almost impossible to detect inconsistencies. Think of all the cases waiting to happen, and for no good reason.

Let me end with three comments.

First, we should stop wondering about the value of plain language. It is, or should be, every bit as accurate and precise as traditional legal writing. It is clearer — considerably clearer. It is usually shorter and faster. It is strongly preferred by readers. It would greatly improve the image of lawyers. In short, if lawyers everywhere made it their goal, "the world would probably change in dramatic ways."[81]

Second, we do need to give more attention to testing major documents, and not just legal documents. Government and businesses send out forms, notices, brochures, and bills by the thousands and hundreds of thousands. Testing a draft costs money. But even some testing is better than none; some kinds of testing are not expensive; and whatever testing is done on mass documents should pay for itself many times over.[82]

So what about testing legislation? Legislative drafters work under severe constraints, especially time, and further improvement will depend in part on institutional changes and support. We can take heart, though, because in a few places government is starting

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[81] GARNER, *supra* note 8, at 661.

[82] *See* MILLS & DUCKWORTH, *supra* note 45, at vii-viii, 67-68 (describing some benefits of plain language, such as less trouble in filling out forms and less need for follow-up by staff); Janice Redish, *Adding Value as a Professional Technical Communicator*, 42 TECHNICAL COMM. 26 (1995) (describing ways to measure the value of clear communication and of testing); *see also* Coopers & Lybrand Associates, Dep't of Health and Social Security, Forms Effectiveness Study 1, 30 (concluding that the annual cost to the agency of errors on its public forms was "of the order of £675 million," that the costs to employers and members of the public were "of similar magnitude," and that the total costs from one common form alone were £3.5 million) (unpublished English study, on file with author); Kimble, *supra* note 1, at 25-26 (listing some reported examples of cost savings that range from hundreds of thousands to millions); Karen A. Schriver, *Quality in Document Design: Issues and Controversies*, 40 TECHNICAL COMM. 239, 250-51 (1993) (listing still more examples).

to see the advantages of testing.[83] Even a very modest program of spot-testing would have the great virtue of allowing for self-evaluation:

> The Office [of Parliamentary Counsel, which drafts Australian legislation] has decided to undertake a document testing program that would involve testing two documents a year. One document would represent the standard or average Bill. . . . The other document would incorporate experiments in plain English. . . .
>
> Testing the first document would monitor our progress towards plainer and more useable legislation. Testing the second document would establish whether techniques that we think improve readability . . . have the desired effect.[84]

This is how legislative drafters could tell whether they really are developing their art — which is, as far as humanly possible, to get the law right and also make it clear to those it governs.

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

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[83] *See supra* text accompanying notes 31, 33.

[84] CLEARER COMMONWEALTH LAW, *supra* note 24, at 102.

Appendix

Script for the Testing

Thank you all very much for helping me out with this little study.

What I will have you do is briefly skim over some legal stuff and then answer a list of questions. You should answer the questions by referring back to the legal stuff.

Now, I want you to understand that this is not a test of you. It's a test of what you are reading. I don't want you to sign it. It's all anonymous. And you don't all have the same stuff anyway.

So please, this is not a competition. It's not a race. Don't worry if some other people finish before you. I'd like you to read at your own normal reading speed. That's part of the study. What I'm trying to learn is how long it takes to use this stuff, reading at a normal pace.

For each question, we'd like you to circle the correct answer. You'll see that one of the possible answers is a question mark. You can circle that answer if you think the legal stuff is unclear or if you're not certain about the answer.

Now, you'll notice that up front here is a clock. We'll start at a time that is rounded off. [Name the time.] You start when I say, "Start." I won't say anything else. When you finish all the questions, look *immediately* at the clock. Write down the hour, minutes, *and* seconds. The minutes can be hard to see, so my secretary will be holding up a sign with the minutes. But you have to get the seconds. [Use an example.] That's all you have to do. We'll figure how long it took.

When you are finishing, please don't make a big display of finishing — don't slam your pencil down; don't shuffle your papers — because that may affect other people. Please just sit quietly and wait until I say we're done.

Also, don't go back and change any answers. When you're done, you're done.

Remember, don't sign either sheet. The only thing you do is answer all the questions and then *write the exact time you finished on your answer sheet.*

Are there any questions? Okay. Please do your best.

([For the statute only.] When everyone is done, ask: "Please rate how difficult you think this exercise was. 1 is very easy. 10 is very hard. Rate between 1 and 10, write that number down on your answer sheet, and circle it. [Pause.] So you should have two numbers on your answer sheet: the time you finished and the level of difficulty.")

Example of a Before-and-After Provision and a Question

Before:

3. The CONSULTANT agrees to fully complete the described assignment and furnish same to the DEPARTMENT by _____ calendar days after notification of Approval, it being fully understood and agreed by the parties hereto that in the event the CONSULTANT shall fail to do so as aforesaid, the DEPARTMENT shall, without the necessity of notice, terminate the services of said CONSULTANT without incurring any liability for payment for services submitted after said due date or shall deduct, as a liquidation of damages, a sum of money equal to one-third of one percent (1/3 of 1%) per calendar day of the total fee if the performance of the entire contract is delayed beyond the due date. Upon written request by the CONSULTANT an extension of time may be granted by the DEPARTMENT in writing, in the event the CONSULTANT has not received from the DEPARTMENT proper information needed to complete the assignment or, in the event other extenuating circumstances occur, the time may be similarly extended. It is further agreed that if a liquidation of damages is imposed pursuant to the aforesaid provisions, any money due and payable to the DEPARTMENT thereby may be retained out of any money earned by the CONSULTANT under the terms of this contract.

After:

5. The Due Date for the Work.

The Consultant must complete and deliver the work by _____ calendar days after receiving notice that the Department has approved this contract. The Consultant may ask in writing for more time, and the Department may grant it in writing, if

(a) the Consultant does not receive from the Department the information needed to complete the work; or

(b) there are other extenuating circumstances.

6. If the Consultant Misses the Due Date.

If the Consultant fails to deliver the work by the due date, the Department may — without having to give notice — choose either one of the following:

(a) terminate the Consultant's services, and not pay for services that are submitted after the due date; or

(b) claim liquidated damages of 1/3 of 1% of the total contract payment for each calendar day late, and subtract this amount from the total payment.

Question:

You are the Consultant. Because of circumstances beyond your control, you will not be able to complete and deliver the work on time. You have spoken to a Department official over the phone, and the official has assured you that it is all right for you to take 10 extra days.

3. If you go ahead and deliver the work 10 days late, based on the authorization you got over the phone, the Department may:

A. Fire you and refuse to pay for the work you delivered after the due date.
B. Retain your services, but charge you a penalty of $33.33.
C. Do either one of the above.
D. Do neither one of the above.
E. ?

[Note: The contract price — $1,000 — was set out in another part of the contract.]