

11-2016

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Jason G. Dykstra

Concordia University School of Law, jdykstra@cu-portland.edu

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Dykstra J, Enhancing the Effectiveness of Your Legal Writing with Plain English, *Advocate*, Nov.-Dec. 2016, at 54.

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Enhancing the Effectiveness of Your Legal Writing with Plain English

Jason Dykstra

A few years ago, I taught a class devoted to discussing the characteristics of “good” legal writing. Generally, good legal writing consists of plain English.¹ In that class, we discussed that good legal writing should be complete, concise, correct, and clear.² In contrast, we discussed the hallmarks of legalese, the long-criticized³, stuffy form of legal writing transplanted to America on the heels of the English common law.⁴ Its hallmarks include long sentences and paragraphs full of needless verbosity and sprinkled with passive voice, defined terms, Latin phrases, and obscure or original acronyms.

Following the class, I returned to my office to finalize a settlement agreement.

As I reviewed the cumbersome language, I noticed a distinct lack of plain English amidst the long sentences of legal jargon. One provision provided that the release in the agreement extended *to and inure to the benefit of the Parties (as defined herein)* followed by a long list of *shareholders, officers, directors, agents, employees, representatives, assigns, subsidiaries, affiliates, predecessors, successors, contractors, subcontractors, and related entities of all of the above*. I sheepishly realized that my draft settlement agreement epitomized legalese.

While perhaps complete and correct, my writing was neither clear nor concise. In pursuit of precision, my form settlement agreement became verbose. Out of caution, my agreement also became redundant. Legalese remains common in part due to time efficiencies and ingrained tradition.



I share this vignette to explain my view of plain English in the law as aspirational. As a practitioner, I aspired to communicate effectively. But the time constraints of a busy practice did not always afford the opportunity to revise legal documents for clarity or brevity.

This article focuses on areas where busy practitioners can aspire for plain English and not only improve their writing but possibly avoid a few pitfalls. As Justice Brandeis once remarked “there is no such thing as good writing. There is only good rewriting.”⁵ So here are three areas to focus on as you rewrite: minimizing initialisms, acronyms, and defined terms; losing legal jargon and cutting clutter; and balancing legal terms and precision.

Minimize initialisms, acronyms, and defined terms

A few initialisms (an abbreviation pronounced one letter at a time, like FBI or EPA) and acronyms can enhance the readability

As Justice Brandeis once remarked “there is no such thing as good writing. There is only good rewriting.”⁵

of your legal writing. For example, common initialisms and acronyms such as FBI, NATO, Radar and Scuba prove familiar and concise. But don’t risk confusing the reader with a swath of innovative initialisms and contrived acronyms.

Consider this:

WVM possessed an LBI in its CNC prohibiting Dr. Goldstein from working for VMC.

You likely tripped over a term and stopped reading or might be forced to frustratingly backtrack to recollect what LBI means.

Using fewer initialisms and acronyms helps prevent this reaction from the reader.

West Valley Medical possessed a legitimate business interest in its covenant not to compete prohibiting Dr. Goldstein from working for Valley Medical Center.

Much easier to understand.

Also, you should be wary of using well-known initialisms and acronyms for other nouns. For instance, the reader might be confused or distracted by references to your client, the Culinary Institute of America, as the *CIA*.

Next, definitions and defined terms also tend to be over-used in legal writing. Many documents, statutes, and regulations contain definitions that can spur considerable confusion. For example, consider this gem for federal statutory interpretation of words denoting number, gender, and so forth in Acts of Congress:

[U]nless the context indicates otherwise-

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well; [and]

words used in the present tense include the future as well as the present⁶

This statute, like many similar boilerplate contract provisions, seems capable of comically expanding the idiom “boys will be boys.” The use of defined terms and definitions can increase the risk of confusion for the reader. To promote clarity in legal writing, minimize

While some Latin phrases offer efficient precision in legal writing (*ex parte*, *de nova*, *per se*), dispense with unneeded Latin phrases (*arguendo*, *seriatim*, *inter alia*).

acronyms, initialisms, defined terms and definitions.

Lose the legal jargon and cut the clutter

Start by losing most of the vestigial Latin, residual legalese, and omitting surplus words. Justice Scalia coined one test, “if you used the word [or sentence] at a cocktail party, would people look at you funny?”⁷

Imagine that you included this allegation in a draft complaint

Defendant’s tortiously negligent conduct in failing to properly maintain the staircase created, caused, and/or resulted in serious bodily harm and injury to said Plaintiff.

Rewrite it to pass the cocktail party test:

The landlord neglected to maintain the stairs causing Alex Hayne’s injuries.

In cutting the legalese, name parties rather than reference their legal roles (plaintiff, tortfeasor, or witness). Also, while some Latin phrases offer efficient precision in legal writing (*ex parte*, *de nova*, *per se*), dispense with unneeded Latin phrases (*arguendo*, *seriatim*, *inter alia*). After striping most of the Latin and legalese, turn your attention to omitting surplus words.

Eliminate or revise long introductory (throat clearing) phrases that add no special meaning. *It is important to emphasize that plaintiff contends that the landlord caused young Ms. Hayne’s injury by leaving an excavated pile of dirt on the property.*

Similarly, simplify your text to eliminate surplus words. For example, *if* can replace *in the event that*, *to* can replace *for the purpose of*, and *because* can replace *due to the fact that*. Finally, eliminate needless repetition, such as *free gift* and *cease and desist*. To enhance the clarity and brevity of your legal writing, rewrite most of the Latin, and legalese and omit surplus words.

But use legal terms where plain English sacrifices precision

Edit legalese into plain English, but retain precise, well-understood legal terms for professional audiences. The use of some legal terms provides efficient precision for the legally trained reader. For example, in plain English try to explain that a case involves the breach of fiduciary duties by corporate directors. And that the plaintiffs cannot proceed in federal court because there is neither diversity of citizenship nor any federal question. So for a professional audience, retain the precision and efficiency of legal terminology.

Conclusion

The audience for legal writing varies widely, from legally trained readers to laypeople. Across this spectrum, readers prefer plain English. So to enhance the readability of your legal writing, aspire to minimize acronyms, initialisms, defined terms and definitions; lose the legal jargon and omit surplus words; but use legal terms where plain English would sacrifice precision.

Endnotes

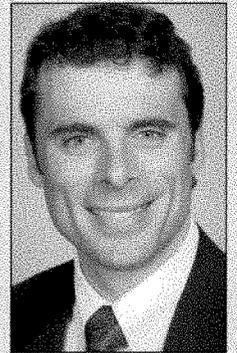
1. Richard C. Wydick, *Plain English for Lawyers* 5 (4th ed. 1998).
2. Richard C. Wydick, *Plain English for Lawyers*, Teacher's Manual 3 (5th ed. 2005).
3. Describing his fellow lawyers' style of drafting statutes, Thomas Jefferson lamented the style of "making every other word a 'said' or 'aforesaid' and saying everything over two or three times, so that nobody but we of the craft can untwist the diction and find out what it means . . .

" Richard C. Wydick, *Plain English for Lawyers* 3-4 (4th ed. 1998)(quoting Letter to Joseph C. Cabell (Sept. 9, 1817), reprinted in 17 Writings of Thomas Jefferson 417-18 (A Berg ed. 1907)).

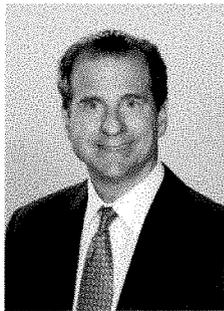
4. *Id.* at 3.
5. Hon. Paul H. Buchanan, Jr., *Memorable Quotes, et Cetera*, 42 Res Gestae 46 (1999).
6. 1 U.S.C. § 1.
7. Bryan A. Garner, *Interview of Justice Antonin Scalia*, 13 Scribes L. Legal Writing 51, 58 (2010).

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Jason Dykstra is an Assistant Professor of Law and the Assistant Director of the Legal Research and Writing Program at Concordia University School of Law. You can reach him at jdykstra@cu-portland.edu.



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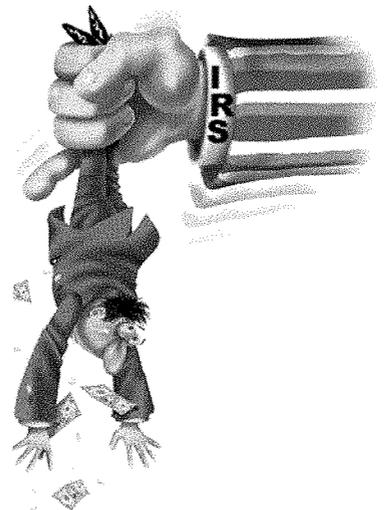
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