MORE True confessions of a Legal Writing Professor

BY DIANA J. SIMON

Don't Be a Turkey –

I have noticed that my students like to use complex words instead of simple words, 40 words in a sentence when 25 would do just fine, and legalese instead of plain language. I do not know why they do this. I could ask, but then I would not be free to speculate, something I like to do. I think they do this because they want to write like lawyers, and they think this means using complicated words to sound "smarter." This assumption is not off base. As Judge Posner once wrote, "Police may not search a person's home without a warrant unless there is an emergency, … what in legal jargon, because our profession disdains plain speech, are called 'exigent circumstances.'"[1]

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– Avoid Gobbledygook

Let me give you some examples of what I mean by using complicated language.

Years ago, one of my students used the word "contrarily" to transition between paragraphs. This word had my synapses firing wildly because *contrarily* is not simple prose—why not just say contrary to or in contrast or conversely?

More recently, a student wrote this: "If a notice of claim contains qualifying language defining various monetary detriments incurred, a demand for the sum of those detriments will not be considered a specific settlement amount." You can see the issue because the phrase "monetary detriments incurred" is not clear—the student was apparently trying to sound like a lawyer through this phrasing.

When I talk to my students about keeping things simple, they look at me like I am an alien; I can practically see the thought bubbles above their heads: "So you want me to dumb things down now that I'm in law school?"

Yes and no. Writing should be simple, but not because lawyers or judges are dumb. To the contrary (though not necessarily contrarily), they are smart. But keeping writing simple and understandable makes content more accessible for more people, and even the most literate people often have too much to read and not enough time within which to read it.

First, I'll address a little bit of the history behind the plain language movement and the movement to avoid writing "gobbledygook." Second, I will address how courts have reacted to gobbledygook and the many ways the rules of procedure encourage plain language. Finally, I will give some tips on using plain language.

The plain language movement in legal writing is not new. Legal writing experts have been advocating for using plain language for decades.[2] Whole books have been written on the subject, and legal writing textbooks instruct students to pare down overly long sentences, minimize passive voice, and omit legalese.

But even before legal writing experts began their plain language campaign, politicians advocated for plain language. (I know this seems shocking.) In 1944, a Texas Congressman named Maury Maverick wrote a memo to his colleagues pleading with them to speak and write in plain English: "Stay off the gobbledygook language. It only fouls people up. For Lord's sake, be short and say what you're talking about. … Anyone using the words 'activation' and 'implementation'

will be shot!"[3]

While many people might object to threatening colleagues to induce plain language use, the underlying goal nonetheless has value. In fact, years later, then-Vice President Gore believed that plain language not only promoted trust in government but rose to the level of a civil right.[4] Accordingly, he created the "No Gobbledygook Award," given monthly to federal employees who took bureaucratic messages and translated them into plain language that citizens could understand.

What is with the repeated references to gobbledygook? Gobbledygook is "inflated, jargon-cluttered prose that fails to communicate clearly."[5] As well-known educator and author Stephen Covey described it, gobbledygook is "language that is so pompous, long-winded, and abstract that it is unintelligible."[6] Inspired by the turkey, the word conjures up the image of a turkey that is "always gobbling and strutting with ludicrous pomposity."

Moving beyond gobbledygook, in 2010 President Obama signed what is informally known as the Plain Writing Act.[7] It defines plain writing to mean "writing that is clear, concise, [and] well-organized." The non-profit organization that advocated for the Act is called the Center for Plain Language.[8] It issues a yearly report card designed to evaluate how well federal agencies follow the Act. If you review the grades for 2024, you will notice that grade inflation is not an issue with this center. The average writing grade was a B-minus,[9] only a slight increase from 2022's C average[10] (there was no 2023 report).

I can report on the agencies' grades without violating FERPA (although the results indicate some of the agencies might benefit from taking a legal writing class). No one got an A-plus, but the Departments of Education and Housing and Urban Development earned As for their public service loan forgiveness and housing discrimination complaint pages, respectively. At the other end of the spectrum, the Department of Labor netted a D for its disability benefits page.

Courts have joined in the campaign favoring plain language. In fact, Gerald Lebovits, a New York judge and prolific writer, boldly put it this way: "Verbosity is impolite." President Obama's solution was the Plain Writing Act.

Maybe things are improving. In 2022, some agencies received failing grades, including the Departments of Housing and Urban Development, Justice, Transportation, Agriculture, and Commerce. While I am sure some of those agencies do some things well, they evidently do not follow plain writing principles, such as using short sentences with active voice, avoiding jargon, and understanding audience needs by being clear.[11]

Courts also have joined in the campaign favoring plain language. In fact, Gerald Lebovits, a New York judge and prolific writer, boldly put it this way: "Verbosity is impolite."[12] I don't know if Ms. Manners would agree, but when I must wade through an unclear, verbose sentence, it is like trying to walk through a dense, dark forest caked in mud.

While President Obama's solution was the Plain Writing Act, one of the many solutions courts have is procedural rules, such as Rule 8(a)(2)'s mandate that plaintiffs write a "short and plain statement of the claim."[13] It's not just plaintiffs. Defendants also must state defenses in "short and plain terms."[14] The "short and plain" statement rule works in tandem with Rule 8(d), which provides, "Each allegation must be simple, concise, and direct."[15] And the Federal Rules of Appellate Procedure also urge lawyers to be brief and clear. For example, lawyers are instructed to "briefly" describe the nature of their cases, give "succinct" argument summaries, and include "short" conclusions.[16] And it goes without saying (although that has never stopped me before) that rules mandating word or page limits are also designed to keep things short and plain.

These rules are not just for show—they have teeth. For example, this year a federal district court in Pennsylvania dismissed a third amended complaint with leave to file a fourth because the complaint violated Rule 8's short and plain statement requirement.[17] The case involved a car crash, and yet the plaintiff somehow turned the incident into a 297-page complaint that was rambling, repetitive, unclear, and unnecessarily complicated. The court dismissed the complaint with leave to amend because it was a pleading that could not be considered "short" or "plain."[18] In contrast, the Ninth Circuit upheld a trial court's decision to deny leave to amend a complaint when the proposed amendment was 733 pages—far from short and plain—noting, "Our district courts are busy enough without having to penetrate a tome approaching the magnitude of *War and Peace* to discern a plaintiff's claims and allegations."[19]

Therefore, while we might be tempted to think that only law students need to learn the virtues of using plain language, it turns out lots of lawyers need help, too.

So, what are some tips and tricks for avoiding gobbledygook? When I talk to my students about this, I refer to the famous line in the movie *Philadelphia* where Denzel Washington, who plays a lawyer, is interviewing Tom Hanks, who plays the client (a lawyer who was wrongfully fired for having AIDS). Mr. Hanks starts telling a story that is somewhat rambling and, at that point, Mr. Washington stops him and says,

"Explain this to me like I'm a 2 year old." At this point in my instruction, my students have fallen asleep because they have not heard of the movie, Tom Hanks, or Denzel Washington. Therefore, I've had to resort to strategies other than movie analogies. Here are 10 basic tips:

- **Avoid legal jargon or, as one judge put it, "that alien tongue known as legalese."**[20] Perhaps lawyers think that peppering their writing with words such as "heretofore," "forthwith," or "further affiant sayeth naught" impresses clients, but most clients would rather their lawyers use plain, direct language.[21] The *Redbook*, one of the most well-known manuals on legal style, has an extensive list of "stuffy words and legalese" with suggested alternatives. For example, instead of writing "instant case," write "this case." And instead of writing "inter alia," write "among other things." Or instead of writing "pursuant to," write "under." The guide provides many other examples of similar legal terms and their plain language substitutes.[22]
- **Similarly, avoid longwindedness**—words and phrases lawyers use to fill sentences, like "so much deadwood in a stream."[23] For example, do not write "aforementioned," "comes now," "hereinafter referred to as," "whereas," or "witnesseth."
- **Pretend you are a contestant on a game show, and the winner is the person who can use the fewest words in a sentence without sacrificing clarity.** This is a game I play with my students, which I have named, "Are you more concise than your writing professor?" And no, I never let the students win. On this instruction, the *Redbook* too is a useful guide, as it provides readers a list of long, stuffy phrases and offers simpler, more natural replacements. For example, instead of writing "adequate number of," write "enough." Instead of "as a consequence of," write "because of," and instead of "as a matter of fact," write "in fact."
- **Instead of using a more complicated word—as with "contrarily" above—use a simpler substitute** such as "in contrast." Or instead of "acquainted with," write "knows."

Avoid legal jargon, "that alien tongue known as legalese." Perhaps lawyers think peppering their writing with words such as "heretofore" and "further affiant sayeth naught" impresses clients, but most would rather their lawyers use plain, direct language.

- **Avoid the temptation to use the doublet and triplet phrasing that lawyers seem to love.** Examples of these wordy phrases are "aid and abet," "any and all," or "by and between," to name just a few.
- **When you write to a court, think about what you would say to a jury.** As one legal writing expert aptly put it: "This is the profession in which no lawyer would speak to a jury in complex and jargon-filled legalese, but if asked to write an affidavit for someone on that jury, the same lawyer wouldn't hesitate to use the phrase *Further affiant sayeth naught*."[24]
- **Use active voice instead of passive voice**, which promotes clarity and brevity.
- **Strive for short sentences**, preferably no more than 25 words.[25]
- **When editing your work, try not to tackle all the problems at once** because you will miss issues. Go through your brief (or other writing) once looking for nothing more than long sentences, unnecessary legal jargon, or complex words that could be replaced with simple words. You can always catch mistakes in quotations and citations on the next round of editing.
- **If you have Microsoft Word, use the "readability statistics" feature.**[26] The readability statistic or "Flesch reading-ease test" attempts to quantify how difficult a text is to read. It considers several factors including total words, total sentences, and total syllables. For example, my score for this article was 55.2, and I averaged 19.6 words per sentence (under the recommended 25 words per sentence, although this parenthetical is adding unnecessary words). While most people should aim for a readability score of 60 (the higher the better), I think I should be excused because of the legalese and wordy expressions I have been forced to write to make my points. In any event, this is yet another way for lawyers to check their writing against an objective standard.

In conclusion, when you write, think of a KISS: Keep it simple, stupid.

Further writing professor sayeth naught.

endnotes

1. *United States v. Collins*, 510 F.3d 697, 698–99 (7th Cir. 2007).
2. Wayne Schiess, *What Plain English Really Is*, 9 Scribes J. Legal Writing 43, 49–51 (2004) (listing numerous resources on how to write in plain language going back to 1963).
3. Richard Norquist, *What is Gobbledygook in Language?* ThoughtCo (Dec. 18, 2018), www.thoughtco.com/gobbledygook-lan-

guage-term-1690903.

4. Kara Evans, *Using Plain Language When You Write*, 30 Nurse Author & Ed. 7 (2020).
5. Norquist, *supra* note 3.
6. *Id.*
7. 5 U.S.C. § 301 note (Plain Writing Act of 2010).
8. Center for Plain Language, *History*, https://centerforplainlanguage.org/about/history.
9. Center for Plain Language, *2024 Federal Plain Language Report Card*, https://centerforplainlanguage.org/2024-federal-plain-language-report-card/.
10. Center for Plain Language, *2022 Federal Plain Language Report Card*, https://centerforplainlanguage.org/2022-federal-plain-language-report-card/.
11. *Id.*
12. Gerald Lebovits, *The Department of Redundancy Department: Concision and Succinctness—Part I*, 78-AUG N.Y. St. B. J. 64, 64 (2006).
13. Fed.R.Civ.P. 8(a)(2).
14. Fed.R.Civ.P. 8(b)(1)(A).
15. Fed.R.Civ.P. 8(d).
16. Fed.R.App.P. 28(a)(6) (requiring a "concise" statement of the case); 28(a)(7) ("a summary of the argument, which must contain a succinct, clear, and accurate statement … and which must not merely repeat the argument headings"); 28(a)(8)(b) ("a concise statement of the applicable standard of review"); 28(a)(9) ("a short conclusion").
17. *See generally Fuhrman v. Mawyer*, No. 1:21-CV-02024, 2023 WL 5672314 (M.D. Pa. Sept. 1, 2023).
18. *Id.* at *13, 15.
19. *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys. Inc.*, 637 F.3d 1047, 1059 (9th Cir. 2011).
20. *State v. Kreth*, 553 A.2d 554, 561 (Vt. 1988) (Peck, J., dissenting).
21. Ginette Chapman, *Apt Phrasing in Legal Writing*, Colo. Law. 10, 11 (Oct. 2021).
22. Bryan A. Garner, The Redbook: A Manual on Legal Style 247–58 (5th ed. 2023).
23. *Id.* at 256.
24. Schiess, *supra* note 2, at 71.
25. Christine Nero Coughlin et al., A Lawyer Writes 273 (3d ed. 2018) ("After 25 words, a reader will usually stop absorbing.").
26. Microsoft, *Get your document's readability and level statistics*, https://support.microsoft.com/en-au/office/get-your-document-s-readability-and-level-statistics-85b4969e-e80a-4777-8dd3-f7fc3c8b3fd2. *See also* Mark Cooney, *Teaching AI to Use Plain Language*, 102 Mich. B. J. 26 (August 2023).