Notes & Queries

In Praise of Simplicity but in Derogation of Simplism

One quality that great legal writers share is the ability to express difficult legal ideas as simply and directly as possible. That's what Max Radin did two generations ago, what Grant Gilmore did a generation ago, and what Charles Alan Wright does today. Simplicity, as Irving Younger once observed, is a great virtue.

But there have always been writers who oversimplify, and their writings are worrisome. For example, I recently acquired a book by one of Max Radin's contemporaries, an author named Ira H. Ruben. The title of this 72-page treatise is *Law Guide for All.*

Though the book was published first in 1938, my copy is from the ninth printing of 1959. The introduction explains its ambitious approach: "In [the book's] brevity and simplicity, . . . authoritative exactness has not been sacrificed. *Correct* legal principles have been rigidly adhered to in a way that permits their *complete* understanding by the average person of average intelligence" (p. iii) (emphasis added).

I wonder just how complete the average person's understanding would have been after reading the following explanation of curtesy:

> Conversely, the husband has a right of "curtesy" in his wife's real estate of which she may be possessed *at the time of her death.* There is no inchoate right of curtesy and therefore, it only attaches to such real property which she owns at the time of her death. Curtesy is a full right for life in all the income from such property but not in the property itself. (P. 15.)

With that paragraph, curtesy is dispatched and we're off to the next topic — with "complete understanding," as Ruben would have it.

So what distinguishes a Ruben from a Radin? It's hard to say. Both were popularizers, for Radin wrote an excellent little book entitled *The Law and You* — 190 pages long — published in 1948 (and dedicated to William O. Douglas). I think that the chief difference is that Radin simplified without oversimplifying; he acknowledged how complex much of the law is — especially as it intersects with real life. And Radin displayed more than a hint of impatience that things have become so needlessly complex.

Thus, in Radin, one reads about what happens to the property of a person who hasn't made a will: "The rules for this distribution are quite complicated. In what order the relatives take if there are no children or grandchildren, and who

excludes whom, are matters which give rise to a great many questions and perplexities" (p. 72). In many passages, one hears the call for law reform:

> One of the difficulties of the inheritance tax system is its complexity, especially in the United States, where there is a federal tax, and in many states, a state tax as well. This requires a great deal of computation which can scarcely be done by such untrained and inexperienced persons as most heirs. Expert guidance is needed and adds to the annoyances and anxieties of people . . . at a time when they are least capable of bearing them. (P. 73.)

Radin's voice is that sensible throughout, especially in the preface, which reads rather differently from Ruben's:

> All that the book hopes to do is to rid anyone of the notion that law is something with which he has no relation except when he gets into what is called "trouble." If, incidentally, he gets a slight acquaintance with legal terms and concepts, with how the law operates and why it takes the form with which it confronts him, it is hard to suppose that this knowledge will do the ordinary ingenuous and peaceful citizen any harm. (P. 9)

What an admirable thing Radin did, making law more accessible to nonlawyers without oversimplifying.

Many more scholars ought to consider this type of effort worthwhile. But few seem to write such books. Among the few others who come to mind is Lon Fuller, whose *Anatomy of Law* (1968) is an undervalued classic.

If the Radins and the Fullers of the legal world don't step forward to do this important work, there are always plenty of Rubens who would be happy to try their inept hands at stating "correct" legal principles that any person on the street can "completely understand."

—Bryan A. Garner
Dallas, Texas

You Talkin' to Me?

Lawyers don't always realize when they are speaking, or writing, in their dialect — legalese. But nonlawyers surely realize it. Jokes poking fun at lawyers' pompous writing reflect the anger and frustration of clients who have been asked to read long opinion letters they can't understand or law-firm newsletters that read like law reviews.

Whatever your purpose in writing something for your client, it will surely be defeated if using legalese discourages the client from reading. Even if you were one of those misguided and insecure lawyers who write only to impress their clients with their superior knowledge, you wouldn't accom-

plish your goal by revealing that you don't know the law well enough to explain it clearly.

In forcing yourself to write in plain English, you face a task opposite to the one Professor Henry Higgins took on with Eliza Doolittle: you have already learned a new way of talking and writing; what you need now is to go back to your old ways to be understood. Although some of the problem is language — using words that only lawyers understand — the cause might be termed cultural, as lawyers assume that everyone knows how the judicial system works or the significance of some famous Supreme Court case. Worse, some lawyers think that understanding legalese is a sign of sophistication and that successful businesspeople are somehow offended by plain English.

Luckily, we don't have as hard a job as Professor Higgins and Ms. Doolittle did, because we can fix our mistakes before anyone sees or hears them. That means you can write in legalese, as long as you are willing to rewrite — edit — so that a nonlawyer can understand it. Then you *can* base a newsletter article on a recent brief, or rework an associate's legal memorandum into an opinion letter.

The overarching principle to keep in mind while editing is the first rule of all writing: consider your audience. With that as your guide, a few simple editing steps will make your writing more intelligible.

1. **Use simple words.** First, get rid of legalisms. Words such as *prior to* and *subsequent to*, for example, aren't strictly legalese — they're English. But they don't mean anything but *before* and *after*. Look at every word, and ask yourself if you'd use it in conversation or if you'd use a simpler word that means the same thing.

2. **Avoid legal jargon.** Most people don't know what *summary judgment* means, or *remand*, or even *cause of action*. These are true legalese — and those of us who speak the language use these terms without having to translate them in our heads. Sometimes one of these terms is really the simplest way to say something, but only if the reader knows what the term means. If there is a simpler way to say it — one that you would use in conversation with a nonlawyer — use it. For example, "When the trial court considers the case again, . . ." instead of "On remand, ..." But if there is no simpler expression, make sure you define the one you're using.

3. **Avoid citations.** No doubt some of your clients want to know where they can find the statute you're discussing. Others will be primarily concerned with how the

law affects them and their businesses, and may be perfectly willing to let their lawyers worry about chapter and verse. A brief reference to the statute by number at the end of a paragraph will satisfy the first group without distracting or intimidating the second.

Similarly, while lawyers have learned to let their eyes skip over case citations, most people haven't. If you must cite a case, don't interrupt your sentence to do it. But first ask yourself if you need to cite the case at all. Some readers may be familiar with a well-known case name, but if your point is simply that a couple of cases have held *X*, why do you need to say the names of those cases, let alone the volumes and page numbers where they are published? If the date is important, use it in the text — "The California Supreme Court held in 1987 . . ." — rather than hidden in a citation where only lawyers know to look.

4. Identify courts. "The U.S. District Court for the Central District of California" means very little to most people, and a parenthetical signal in a case citation (C.D. Cal.) means nothing. But "a federal trial judge in Los Angeles" helps your reader. Similarly, don't assume your reader knows that California's court of appeal is divided into districts (or even that there is an intermediate appellate court between the trial court and the Supreme Court) or that decisions from another federal circuit aren't binding on district courts in California. On the other hand, don't waste time and space explaining such details if they aren't important for your reader to know.

5. Keep quotations short. Long quotations are hard to read, and those from judicial opinions are frequently hard to understand. But the law is built on just such quotations, and the exact words the court used are important — to lawyers and to other courts, *not* to clients. If a case or statute uses a term that is especially important, or phrases something particularly well, quote the passage if it's short, and explain it. Otherwise, *anything* can be paraphrased.

6. Keep your purpose in mind. Newsletter articles educate your clients. Letters explain why you're conducting the case as you are, and why you seek specific information or guidance from clients. Neither is supposed to prepare your clients to represent themselves before the U.S. Supreme Court. Tell them what *they* need to know, not what you or other lawyers might find intriguing about the topic.

Why should your clients care that the supreme court of one other state disagrees with the

nearly unanimous rule, for example, or that you have devised a clever way to distinguish that anomalous case?

You don't see *L.A. Law* devoting episodes to explaining how the law developed; instead, it shows how the law applies to real (sort of) life. If your clients pay more attention to *L.A. Law* than to you, it may be because you aren't telling them how the law you're discussing affects their lives.

7. Chill out. Lawyers often worry that they haven't been absolutely accurate in their description of a decision, or that they haven't covered every contingency. For example, we hesitate to say we will "appeal" a pretrial ruling because we really will be seeking a writ. But most clients don't know writs of error from Ritz crackers, though they do understand that an "appeal" means that another court will reconsider the defeat they just suffered.

8. You can go home again. I have a friend who grew up in the Florida panhandle but has since lived in Chicago and Washington, D.C., and now is an urbane San Franciscan. Sit in a meeting with him and you may have no idea of his roots. But walk by his office when he's on the phone with the folks back home, and you'll hear speech so thick you could spread it on cornbread.

We've all experienced, and practiced, this chameleon-like adaptation of our speech patterns to those around us. The problem is, lawyers spend too much time around each other. Before writing, we read things that other lawyers have written: briefs, memos, and judicial opinions. No wonder we write like lawyers! How can you ask yourself if you'd use a word in conversation with a nonlawyer if you rarely *have* a conversation with a nonlawyer?

We need to look up from the advance sheets and the memos and read some plain English in the popular press or in a good novel. If they communicate well to us, they teach us how to communicate with others. By acquainting ourselves with good prose — and by keeping in mind what we're saying and to whom — we can write letters and articles that our clients will appreciate reading.

—Clyde Leland
Oakland, California

A Drafting Dilemma

During my years as a writing consultant to law firms, I have been asked five or six times to choose between *or* and *and* in clauses of which the following are examples:

- Use of cash collateral will terminate on the earlier of (1) January 1, 1995, [or] [and] (2) the appointment of a trustee.
- Use of cash collateral will terminate on the earliest of (1) January 1, 1995, (2) the appointment of a trustee, [or] [and] (3) conversion of the case.

My answer has been *or* — on the grounds that the writer is describing "either–or" situations, the first of which can be rephrased as "Use of cash collateral will terminate on January 1, 1995, or with the appointment of a trustee, whichever is earlier."

I was not altogether confident with my choice and justification, so I looked in the various published authorities for some discussion of this question — to no avail.

I then wrote the editor of this journal; his response was to choose *or* because, though not logical, it is idiomatic. I'm delighted that we agree on *or*, but I'm not sure it isn't the logical choice.

—Richard H. Miller
New York City

The Art of the Statute

All literate persons believe that they can write certain things. One of them, seemingly, is a statute.

Although this attitude amazes and even infuriates professionals, they can learn some lessons by reflecting on why amateurs believe that statutes are artless and therefore easy to write. One reason is that amateurs fail to discern many facets of the art of statute-drafting, the very facets that a drafter must master to become an expert.

One such facet is a thorough grounding in statutory conventions. Amateurs who try to draft are likely to have seen a few statutes and thus know a few of the conventions applicable to them. They may also know a few of the other kinds of conventions relevant to statutory drafting, such as those applicable to legislative bills, the means by which statutes come into existence. Some of the conventions applicable to statutes and bills, such as the technical requirements for valid legislation, derive from constitutions. Others derive from existing statutes, legislative rules, court cases, and the style guides of official drafting agencies. One indication of the immensity of these conventions is the size of the current drafting manual of the Wisconsin Legislative Reference Bureau, which explains the state's drafting conventions. No amateur could know more than a small percentage of its 288 pages' worth of explanations.

In drafting, what is the relationship between conventions and expertise? Experts realize that they can use conventions as an aid to writing statutes that are not only technically correct, but also stylistically excellent. For example, Wisconsin bills contain a "relating clause," which identifies their main subjects. Bills lacking them — including many bills drafted by amateurs — are technically flawed. Learning to include such a clause is one step toward proficiency as a bill-drafter. But learning how to use the convention to succinctly state a bill's subject is a step beyond proficiency — a step toward excellence. Thus, a relating clause focuses the attention as the drafter moves into statutory details. One forestalls what Nietzsche called the most common cause of stupidity: forgetting what one is trying to accomplish.

The amateur is also unlikely to recognize how complex the relationship is between statutes and the everyday activities they govern. Such a drafter often tries to solve a narrow problem without concern for the statute's broader reach. The statutory phrasing may be too wide or may cause administrative problems that are far worse than the substantive problem to be cured. And sometimes the draft merely states an expectation or desire without creating a requirement.

The expert drafter must be a problem-solver, must be able to articulate real-world problems clearly and to suggest various solutions. Upon completing a preliminary draft, an expert drafter should be able to determine how the statute will change behavior and whether the changes are the desired ones.

Similarly, the expert knows that statutes are a complex and tightly integrated system that must be able to accommodate new material. Dealing with the conceptual integration of a set of statutes takes considerable knowledge. So does understanding the concomitant changes in policy directives.

Even bills themselves are systems. As such, they must be both internally consistent and complete. For example, a bill creating a new tax must consist of more than a statement of imposition, a rate, and a base. To be a complete system, such a bill must also include all the necessary administrative provisions, such as those delineating collection mechanisms, appeals, penalties, reports, and refunds.

Organizing this system well is another matter altogether, but it is also another feature that distinguishes expert from amateur drafting. One must order the parts of a new statute logically, just as a good writer orders an essay logically. In drafting, good organization en-

hances clarity while improving the content by making omissions less likely.

Finally, an amateur drafter, convinced that drafting is easy, is unlikely to worry about how a court will interpret the statute. But statutory misconstruction and statutory deconstruction are serious problems. Drafting errors often create ambiguities and thus require judicial interpretations — interpretations that may well vary from what the drafter intended.

Sometimes, indeed, even clear drafting is not enough: a court may reject a statute's plain meaning. Thus, the expert drafts defensively to make statutory misconstruction difficult if not impossible.

This problem presents an opportunity. To fend off judges bent on effecting their policy preferences under the guise of "interpreting" a statute, one must consider several issues. And doing so makes one a better drafter. One such issue is how broad to make a given statute. Narrow statutes are more difficult to misconstrue but may not be broad enough to effectuate the intent. Broad statutes, by contrast, may be appropriate but are easier to misconstrue. Most statutes fall somewhere near the middle of the breadth spectrum. Wherever a statute might fall, though, the drafter needs to consider its exact position on that spectrum.

The very best drafting seems as artless as a Bach fugue. In both, the composer's decisions seem so inevitable that the whole seems to have been created in one sudden act of genius rather than in an arduous series of artful acts. But the appearance and the reality are two different things: the drafting process requires great art, while the result should appear utterly artless.

—Jack Stark
Madison, Wisconsin

Organizing New Statutory Material

Legislative drafters frequently need to solve the difficult problem of organizing new statutory material. Unfortunately, they have little published material to aid them with that task. The best-known advice about organization is Reed Dickerson's, which many drafting manuals include. In *The Fundamentals of Legal Drafting*, Dickerson presents what he calls a "generally acceptable" sequence of statutory sections.

Although Dickerson has of course offered much useful advice, his advice about organization is poor. First, he does not list statutory sections but parts of a typical federal act; hence, state drafters who are composing new material

for codified statutes will not be able to use that sequence without substantially modifying it. Second, he does not explain his reasons for recommending his scheme, nor does he explain how a drafter should use it. And third, in practice, the advice does little to improve drafting.

One can most efficiently assess the merits of Dickerson's scheme by using it to try to solve a real organizational problem. Imagine that you're trying to draft a statute that sets forth the law about distributing a kind of state aid to local governments. The topics to be included are, in alphabetical order:

- account;
- aidable-revenue payments;
- corrections;
- definitions;
- distributions;
- information to be submitted;
- minimum and maximum payments;
- per capita payments;
- public-utility payments; and
- statement of estimated payments.

That is certainly not the best arrangement, but it has a modicum of justification: a reader who knows the title of a topic can find the statutory unit in its alphabetical place.

Anyone using Dickerson's list to organize those topics runs into a problem immediately: only 4 of the 16 items in Dickerson's list apply to those topics. Those 4 are as follows: (1) definitions, (2) main working provisions, (3) subordinate provisions and special provisions that are broad and important enough to be stated as separate sections, and (4) administrative and procedural provisions. The second, third, and fourth items are arranged in descending order of importance — an order suggestive of the organizing principle of most journalism.

A drafter using this scheme would begin with the definition section and then sort the other nine topics into main, subordinate, and administrative provisions. Dickerson offers no guidance about organizing topics within one of the 16 items in his scheme, but a drafter can follow logic and organize at that level, too, in descending order of importance. A drafter following Dickerson's advice would perhaps organize the 10 topics this way:

definitions
main provisions:
  aidable-revenue payments
  per capita payments
  public-utility payments
subordinate provisions:
  maximum and minimum payments
  corrections
administrative provisions:
  distributions
  account
  statement of estimated payments
  information to be submitted

I arrived at that order by first putting under "main provisions"

the units that describe the basic calculations of the three payments and ranking them according to the amount of money paid under each. Then I put the two secondary calculations, which alter the amounts determined by means of the basic calculations, into the section for subordinate provisions and ranked them according to the magnitude of the changes they cause in the basic calculations. I put the administrative provisions in an order according to a commonsense notion of their importance.

To be blunt, the mental operations that Dickerson's scheme encourages do not help drafters. Trying to evaluate the relative importance of statutory units will not help one draft well. Nor will a drafter's efforts to do that help a reader, who is looking for a guide to behavior, not for someone's rank ordering of items.

The drafter would do better to recognize at the outset that the form of a new statutory unit, like the form of any other mental construct, should help its creator think about the material it organizes. Form follows function: a drafter can work effectively by first understanding the material and then deriving an organizing principle from it. Those two steps become easier if the drafter looks at the material from a reader's point of view, remembering that a reader will be trying to determine the actions that the statute requires, authorizes, or forbids.

The statutory material used in our illustration consists of a sequence of steps — most of which various state employees are required to perform — that result in payments to local governments. Thus, the material, like much other statutory material, all but demands a chronological organization. That kind of organization will impel the drafter to think — really think — about the material, to make sure that he or she understands it and then describes all the necessary steps clearly and adequately. Once it is put in that form, the reader will probably be able to consult the statute much more comprehendingly.

Dickerson correctly claims that it makes sense to put definitions first, so that a reader will know from the beginning the meaning of the terms used. Putting other topics in chronological order creates the following arrangement:

- definitions;
- account;
- information to be submitted;
- per capita payments;
- public-utilities payments;
- aidable-revenue payments;
- minimum and maximum payments;
- statement of estimated payments;
- distributions; and
- corrections.

First the account is established; then the units of government submit the information needed for the calculations; then the basic calculations are made; then the payment to each unit of government is adjusted so that it does not differ more than the allowed amount from the previous year's payment; then estimates are sent out; then the payments are made; and, finally, errors are corrected.

Why are aidable-revenue payments the last of the calculations? Because they consist of the money in the account minus the other two payments. A drafter using this organizational scheme is likely to realize that fact about aidable-revenue payments. A drafter using the other scheme is considerably less likely to know it.

Like many other problems in legislative drafting, the problem of organizing new statutory material has received some attention in books and articles, but those discussions are not nearly as illuminating as they might be. For drafting techniques to improve still further, those who practice them — and think innovatively about them — should communicate the results of their thinking to other drafters.

—Jack Stark
Madison, Wisconsin

The Empire Strikes Back

A Postscript to "Heroes of the Revolution"

In the last issue of this journal, I contributed an article about two 19th-century critics of legal language, Henry Dwight Sedgwick and Timothy Walker. I attributed a famous parody of legal language — the phrase "I give you an orange" translated into legalese — to an 1848 article written by Walker. But Walker, it turns out, did not originate this caricature. The Plain-Language Committee of the State Bar of Texas repeated my error when it relied on my research in awarding Walker a place in the Plain-Language Hall of Fame, which was reported in the same issue.

In fact, the parody appeared first in an 1835 book written by the Englishman Arthur Symonds.

Three learned readers wrote to the editor to correct the error: The Right Honourable Sir Robert Megarry, of the Institute for Advanced Legal Studies at the University of London; David C. Elliott, a barrister and solicitor in Edmonton, Alberta; and Professor Peter Butt, of the University of Sydney Faculty of Law. Each one pointed out that the parody had appeared 13 years before Walker published his article. Sir Robert

Megarry, in fact, had quoted Arthur Symonds's parody in his *Second Miscellany-at-Law: A Further Diversion for Lawyers and Others* (1973).

Symonds intended his book, *The Mechanics of Law-Making* (London, Edward Churton 1835), "for the use of legislators, and all other persons concerned in the making and understanding of English laws." He complained that English laws were "the clumsiest pieces of workmanship which the unskilled labour of man ever made." On page 75, Symonds offered his parody of legal language:

> If a man would, according to law, give to another an orange, instead of saying: — "I give you that orange," which one should think would be what is called in legal phraseology, "an absolute conveyance of all right and title therein," the phrase would run thus: — "I give you all and singular, my estate and interest, right, title, claim and advantage of and in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away as fully and effectually as I the said A.B. am now entitled to bite, cut, suck, and otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp, and pips, anything hereinbefore, or hereinafter, or in any other deed, or deeds, instrument or instruments of what nature or kind so ever, to the contrary in any wise, notwithstanding," with more to the same effect.

Professor Butt, in his letter, raised the issue of plagiarism. I doubt that Walker intentionally plagiarized the piece. It is more likely that by 1848 American lawyers were passing transcriptions of the Symonds's parody to one another and that the true authorship was lost during this transmission. Copies of Symonds's book were probably scarce in the United States: the book never had an American publisher. Sir Robert Megarry notes that Walker's version was a "small enfeeblement of the original"; it ineptly substituted "heretobefore, or hereafter" for "hereinbefore, or hereinafter." This enfeeblement may indicate a passage long separated from its original source.

I thank Sir Robert Megarry, Professor Butt, and Mr. Elliott for catching my error and the editors for allowing me this opportunity to correct it.

—Mark E. Steiner
Houston, Texas