The 1993 Legaldegook Awards

Plain-Language Committee, State Bar of Texas

As usual, we had no shortage of nominations; the only difference this year is that several came from abroad (one of them a winner). We sought, as always, the most "delightfully atrocious" examples of legal writing we could find.

We exempted the Internal Revenue Code last year but couldn't bring ourselves to do so this year. The Code gets two awards ("Time Out of Mind" and "Deceptive Simplicity"). And, of course, President Clinton's proposed health-care legislation heads the list; the substance of that legislation may be good for your health, but reading it might prove injurious.

Bryan A. Garner
Chair, Plain-Language Committee

The "Splitting Headache" Award

For the Legal Drafting Most Likely to Induce Migraines

(B) FAMILY. — In the case of an individual enrolled under a health plan under a family class of enrollment (as defined in section 1011(c)(2)(A)), the family out-of-pocket limit on cost sharing in the cost sharing schedule offered by the plan represents the amount of expenses that members of the individual's family, in the aggregate, may be required to incur under the plan in a year because of a general deductible, separate deductibles, copayments, and coinsurance before the plan may no longer impose any cost sharing with respect to items or services covered by the comprehensive benefit package that are provided to any member of the individual's family, except as provided in subsections (d)(2)(D) and (e)(2)(D) of section 1115.

Health Security Act of 1993, § 1131(c)(4)(B)
(from the Clinton Administration's 1,300-page
proposed health-care legislation).

The "Here! Here!" Award

For a Sentence That Knows Where It's At

The Court may take judicial notice of such pleadings which are on file herein and such pleadings are incorporated herein by reference and made a part hereof as if copied here in full.

The "Here, There, and Everywhere" Award

For the Most Impressive Succession of Locatives

It all fully appears from the affidavit of the publisher thereof heretofore herein filed.

The Obtuse Titling Award

For the Most Obscure Name of a Court Order

Order Striking Affirmation in Opposition to
Allowance of Claims Seeking the Disallowance of Invalid Claims

The "She Left Before She Really Got Here" Award

For a Law That Was Formally Repealed Before It Was Enacted

In 1990, the New York Legislature repealed a section of the Insurance Law before enacting it. *See* 29 McKinney's Consolidated Laws of New York Annotated § 2235 (West Supp. 1993) (historical & statutory notes).

The "Time Out of Mind" Award

For Tax Laws Caught in a Time Warp

The provisions of the preceding sentence shall not be applicable with respect to the taxable year beginning January 1, 1975, or any succeeding taxable year which begins before January 1, 1980; and, for purposes of such sentence, January 1, 1980, shall be deemed to be the first January 1 occurring after January 1, 1974, and consecutive taxable years in the period commencing January 1, 1980, shall be determined as if the taxable year which begins on January 1, 1980, were the taxable year immediately succeeding the taxable year which began on January 1, 1974.

Internal Revenue Code § 3302(c)(2)(C).

The Typo Graphic Award

For the Most Painful Typos in Legal Papers

In 1991, this award went to a brief whose index was said to contain an "extensive copulation of authorities." In 1992, the winner was a court paper addressed to "The Horable U.S. District Judge." This year, we have two winners. The first is a notice of appeal that, just before the signature block, states: "Rectfully submitted."

The second is an educational paper having to do with "demised premises" in an agricultural lease. Lonny Morrison, the President of the State Bar of Texas, spotted and nominated it, noting that the author seemingly "misunderstands the extent of the rights typically granted a tenant in an agricultural lease":

As such, the tenant is entitled to exclusive use and possession of the demised penises as though he had acquired the fee-simple title to the property.

The Serpentine Sentence Award

For an Anaconda-Like Sentence from a Contract

Notwithstanding anything in this Agreement to the contrary, provided that at the time, or at any time after, a default or breach by Purchaser under this Agreement occurs neither the Property, Purchaser nor the owner of the Property (if such owner is not Purchaser) is seeking the protection of or is then the subject of any federal or state bankruptcy or similar proceeding (other than a preceding wherein the Property has been abandoned by the debtor or all stays lifted within 30 days after the application for same by Purchaser), subject to the exceptions and qualifications described below, Purchaser shall have no liability for (a) the payment of any indebtedness evidenced by the Note or any other sum or charges which may become due thereunder, or (b) the performance or discharge of any covenants or undertakings under the Loan Documents or this Agreement; provided, however, that nothing contained in the preceding portion of this sentence shall in any way or manner reduce, release, impair or otherwise affect the obligations of Purchaser (except as expressly set forth therein) or any other party or the rights of any holder of the Note, under the Note, the other Loan Documents or any other document or instrument executed in connection therewith or this Agreement, including, without limitation, (i) the existence or validity of the indebtedness evidenced by the Note, the other Loan Documents or any other document or instrument executed in connection therewith or (ii) the validity or enforceability of the rights, powers, privileges, remedies, liens and security interests created by the Note, the other Loan Documents or any other document or instrument executed in connection therewith or this Agreement, or in any way or manner preclude the Bank from foreclosing or exercising any other rights or remedies under the Loan Documents or realizing upon the collateral, upon the happening of any default in the payment of the Note or any of the events of default described in the Loan Documents or this Agreement.

The "What Language Is This?" Award

For the Most Bemusing Introduction to a Court Paper

Defendant/Counterplaintiff responds to Plaintiff's Motion to Strike and states that if its allegations through paragraph 68 in Count II of the Second Amended Counterclaim are not sufficient to support punitive damages to be awarded for a large corporation attempts to through conspiracy in sheer corporation throwaway to muscle out of business a sole proprietorship from punity, then so be it.

The Sesquipedality Award

For the Most Splendiferous Display of Highfalutin Vocabulary

The evidentiary record consisting of a four (4) day trial is gargantuan, elephantine and Brobdingnagian . . . .

It would be hebetudinous and obtuse to fail to be cognizant of the adverse consequences of a ruling in this case. However, a decision by a court should not be infected with pusillanimity and timidity. The karma of this case must not be aleatory or adventitious, but a pellucid and transpicuous analysis of the law and facts . . . .

With certitude and intrepidity and hopefully, with some degree of sagacity, sapience and perspicaciousness this court disposes of the relevant and germane issues.

Autochthonously, this court bifurcates the issues for decisional purposes. The primigenial issue is whether a new trial should be granted. The court comes to this infrangible, ineluctable and adamantine conclusion that defendant's motion for a new trial absolutely must be denied. The French phrase *pas du tout* is applied in rejecting the defendant's argument . . . .

I find defendant's degree of culpability to be magnitudinous and megatherine.

Circuit Judge Ralph Anderson, of South Carolina,
in a ruling reported in James J. Kilpatrick,
Judge Anderson's Splendiferous Opinion One for the Books,
Atlanta Journal and Constitution, 14 April 1993, at A13.

The Plastic Surgeons' Lobby Award

For a Surprising Instance of Legislatively Coerced Surgery

A person commits an offense if he intentionally or knowingly possesses . . . knuckles.

Texas Penal Code Ann. § 46.06.

The "Last Refuge of Scoundrels Award" Award

For a Brief That Says What Was Really on Sam Houston's Mind

The United States, like the Republic of Texas, inherited a complete body of international law of negotiable instruments upon independence. The Texas Declaration of Independence was signed March 2, 1836, confirmed in blood at the Alamo and San Jacinto by heroes from around the world, including the famous Volunteers of Tennessee, the Alabama Red Rovers, and especially the New Orleans Greys whose flag flew over the Alamo. Men came from Mississippi, Georgia, Louisiana, and almost every State North and South to fight. These men did not come to Texas to give up their rights. Instead, they melded their rights brought from all over the world to form the Republic of Texas, recognized by the United States as a nation and by Treaty of 1840 with England as a sister nation while adopting English common law as the Texas Rule of Decision. It is the glory of Texas that its rights were won by the people. These rights

included then and still include now the right to hold variable rate notes as negotiable instruments . . . .

The "Please Keep This in Mind" Award

For the Choicest Clarification
by a Legal Economist in a Law Review

In framing the Government's argument, we fully recognized the possibility that Kodak, or any other original equipment manufacturer (OEM), can behave opportunistically vis-à-vis its installed base customers in the provision of post-purchase replacement parts and maintenance and repair services. Such opportunistic conduct features extensively in Williamsonian and game-theoretic models of firm behavior. We were also mindful of the fact, however, that in markets in which such conduct is possible, rational consumers will anticipate and try to protect against it in a variety of ways. They may purchase long term service contracts, review seller's (accounting) costs to ensure that price increases are 'cost justified,' second-source, and so on. Moreover, we applied the accepted learning from the pertinent strategic models that when 'exploitation' of locked-in purchasers is feasible, ex ante competition will tend to be fierce so that some or all of the ex post profits will be intertemporally transferred to the very same purchasers through 'low' initial prices.

The Deceptive Simplicity Award

For a Seemingly Straightforward Tax-Code Provision
Requiring 567 Pages of Interpretative Regulations

A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section . . . if the

contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees (within the meaning of section 414(q)).

Internal Revenue Code, § 401(a).

The Chicken Little Award

Now What's Going to Happen, in This Brief-Writer's View?

To adopt Petitioner's argument that it should be allowed to rely upon information not given, which was not asked for, would result in bad policy and negatively affect the ability of the Comptroller's Office to answer any taxability question because of a fear that possible questions which could be raised by someone like Petitioner, but aren't, will not be answered, and result in claims like the one before us today.

The Heinous Headnote Award

An Australian Contribution to the Art of Legaldegook

Held, that in determining whether an act or omission which constitutes a permitting of a thing caused the damage which subsequently resulted, what is involved is the selection from the events preceding the damage of the events which are, for the purposes of the law, to be seen as in the relevant sense causally responsible for it.

Petrou v. Hatzigeorgiou, New South Wales Court of Appeal, Australian Tort Reports 68, 559 (1991).

Golden Oldie Award

For the Obscurest Way of Saying, "We made a mistake."

And in the outset we may as well be frank enough to confess, and, indeed, in view of the seriousness of the consequences which upon fuller reflection we find would inevitably result to municipalities in the matter of street improvements from the conclusion reached and announced in the former opinion, we are pleased to declare that the arguments upon rehearing have convinced us that the decision upon the ultimate question involved here formerly rendered by this court, even if not faulty in its reasoning from the premises announced or wholly erroneous in conclusions as to some of the questions incidentally arising and necessarily legitimate subjects of discussion in the decision of the main proposition, is, at any rate, one which may, under the peculiar circumstances of this case, the more justly and at the same time, upon reasons of equal cogency, be superseded by a conclusion whose effect cannot be to disturb the integrity of the long and well-established system for the improvement of streets in the incorporated cities and towns of California not governed by freeholders' charters.

Chase v. Kalber, 153 P. 397, 398 (Cal. Dist. Ct. App. 1915).

The Plain-Language Hall of Fame

1993 Inductees

Sir Thomas Egerton (Baron Ellesmere and Viscount Brackley), 1540?–1617. In one of the most dramatic historical attempts to encourage plain language, Chancellor Egerton — offended by a 120-page pleading called a replication — sentenced the offender to an odd punishment indeed:

> "It is therefore ordered that the Warden of the Fleet shall take the said Richard Mylward . . . into his custody, and shall bring him unto Westminster Hall on Saturday next . . . and there and then shall cut a hole in the myddest of the same engrossed replication . . . and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders with the written side outward; and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the courts are sitting, and shall shew him at the bar of every of the three courts within the Hall." Quoted in 5 William S. Holdsworth, *A History of English Law* 233 n.7 (1924) (reporting on *Milward v. Welden*, 21 Eng. Rep. 136 (Ch. 1566)).

Lon L. Fuller, 1902–1978. Born in Hereford, Texas, Fuller rose to be a highly reputed legal philosopher at Harvard *despite* his lucid writing style. The author of many books — including *The Morality of Law* (1964), *Legal Fictions* (1967), and *Anatomy of the Law* (1968) — Fuller routinely used down-to-earth metaphors, as when he called legal fictions "the growing pains of the language of the law." (*Legal Fictions*, p. 22.)

And when it came to lawyers' obscurity, Fuller laid bare the truth that it has nothing to do with precision. He decried the notion "that lawyers, with all their forbidding jargon, have some uncanny ability to convey meaning to one another with great exactitude," adding: "Outside the area of a few terms of art, there is nothing to this belief. To fill in the spaces between their 'whereas's' and 'provided however's' lawyers have no resources

except those available to any user of language." (*Anatomy of the Law*, p. 26.)

Oliver Wendell Holmes, Jr., 1841–1935. Civil War soldier, man-of-letters, legal scholar and philosopher, lawyer, Massachusetts judge, and finally Justice of the United States Supreme Court, Holmes stands alone as the preeminent American legal prose stylist. Lawyers know him best for his judicial opinions, especially the influential dissents in free-speech and freedom-of-contract cases. But he also wrote what is probably the most important American book on the law (*The Common Law* (1881)) and the best essay on the law ("The Path of the Law" (1897)).

A Holmes opinion often captured, in a striking metaphor or a brilliantly penetrating phrase, an essence that eluded even the most gifted legal analysts among his judicial colleagues. Yet literary artistry — which shines unmistakably from his judicial opinions — did not mean being flowery or highflown. Holmes wrote concretely, vividly, directly — and, thus, briefly. Having no patience for airy legalese, Holmes is said to have remarked, "Lawyers spend a great deal of their time shoveling smoke." Finding Holmes in the legal reports of the time is no search for Waldo: the reader need only look for what is shortest, freshest, and least stodgy.

Previous Inductees to the Plain Language Hall of Fame

Charles Beardsley (1882–1963)
Jeremy Bentham (1748–1832)
Thomas Jefferson (1743–1826)
Abraham Lincoln (1809–1865)
Fred Rodell (1907–1980)
Timothy Walker (1802–1856)

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