Late Fall 2011

# The Scrivener

Scribes — The American Society of Legal Writers



## The Plain Writing Act of 2010: Getting Democracy to Work for You

by Dr. Annetta Cheek,
Board Chair, Center for Plain Language

*To mark the one-year anniversary of the signing of the Plain Writing Act of 2010, we asked Dr. Annetta Cheek, who for many years spearheaded this effort, to tell our readers how the act came to be law.**

The Center for Plain Language, a 501(c)(3) organization in the Washington, D.C. area, was founded in 2003 with the mission to get government and business to write more clearly to their customers. Most of the original founders were federal employees (now mostly retired) who were frustrated by years of struggling to get their own agencies to think about their readers. For the first couple of years at the Center, we continued to work within existing legal authorities to achieve our goals. Eventually, we became resigned to the futility of that approach, and we determined to get Congress to pass a bill requiring the government to write more clearly.

Early in 2006, we started visiting Capitol Hill, looking for someone to help. It was clear that a lot of the people we saw thought we had a snowball's chance in you-know-where of making this happen. They thought it just wasn't bill material (never mind all the silly bills that Congress comes up with on its own). We tried several approaches, first trying to tie it to government performance because that was a hot topic at the time; many members of Congress liked the Government Performance and Results Act (GPRA).

But we got no nibbles on that approach, so we started visiting people who cared about small business. By then

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## The President's Column: When Enough Is Enough

by Steven Smith,
Dean, California Western School of Law

My optimism that legal writing in America is improving—except statutes and regulations—is being tested. The September 19, 2011, situation underlying the decision of the Seventh Circuit in *Stanard v. Nygren* is enough to erase that optimism. *Stanard v. Nygren*, No. 09-1487, 2011 U.S. App. LEXIS 19213, 2011 WL 4346715 (7th Cir. Sept. 19, 2011). (The citations in this column are to the Seventh Circuit opinion.) If good writing can get us closer to justice (as I argued in my prior column), then this case illustrates that bad writing can delay and deny justice.

Michael Stanard held public events at an amphitheater and claimed that Sheriff Keith Nygren and his deputies required him to hire, at inflated rates, off-duty deputies as security. Stanard's attorney was Walter Maksym (best known for representing Drew Pearson). He filed a 52-page civil complaint against Nygren and 22 deputies, asserting a variety of federal and state claims. The U.S. District Court for the Northern District of Illinois found that the complaint did not comply with Rules 8 and 10(b) because it was "incomprehensible and riddled with errors." *Id*. at 2. Maksym twice filed inadequate amended complaints, often filing late responses to orders or motions. After the second amended complaint, the district court had had enough. The court cited many elements of bad writing that cumulatively made the complaint "unintelligible" and noted that Maksym had neglected to correct the errors

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(The Plain Writing Act of 2010 *continued from page 1)*

we had partnered with the National Small Business Association, whose CEO, Todd McCracken, believed that clearer language from government would benefit his constituency. One of the Center's board members, John Spotila, had been General Counsel of the Small Business Administration under President Clinton. A lot of folks he had known back then were working on the Hill in various offices that were interested in small-business issues. Eventually, one of those folk recommended that we approach a Democratic freshman from Iowa, Bruce Braley. We were told that Braley, as a freshman, would be looking for issues that he might be interested in taking on.

Fortunately for us, Representative Braley was indeed interested in the issue. As a former trial attorney, he had been subjected to convoluted legalese in his daily work. And he thought that confusing language from the government did a disservice to the American people. Braley was an ideal sponsor because he had a deep personal commitment to the issue.

To support Representative Braley's effort, we needed to find other organizations—preferably ones that were a lot bigger than the Center—to join the cause. We'd already gotten the National Small Business Association. Over the next few months, we added Consumers Union, Disabled American Veterans, American College of Surgeons, and several other health- and writing-related organizations. Most importantly, we added the AARP.

Getting organization support works much like getting the support of a congressional member. You call people. Ideally, you call someone you already know. Failing that, you call someone who knows someone you know. In our case, a Center board member from the Veterans Benefits Administration introduced us to an acquaintance at the Disabled American Veterans who just happened to be its executive director. Another board member, then at the Food and Drug Administration, knew people in the health world. And we knew several folks at AARP who had been longtime advocates of plain language, especially Nancy Smith, then-vice president, AARP Financial. She had been the director of consumer education at the Security and Exchange Commission under Arthur Levitt—a strong supporter of plain language—in the Clinton years.

In some cases, we knew no one. I made a lot of cold calls—not my favorite activity. Some people didn't want to listen. Common Cause, for example, turned up its nose at the concept. Consumers Union, on the other hand, immediately saw the importance of our effort to its own mission.

After lining up significant organization support, Representative Braley felt comfortable introducing a bill early in 2007. Upon introducing the bill, Braley said, "Writing government documents in plain language will increase government accountability and will save Americans time and money. Plain, straightforward language makes it easy for taxpayers to understand what the federal government is doing and what services it is offering."

In 2008, we landed our Senate sponsor, Daniel Akaka of Hawaii, who introduced a companion law in the U.S. Senate. While the act passed the House with a healthy margin—376 to 1—it failed to reach the Senate floor because Robert Bennett of Utah placed a hold on it. Despite several visits with Senate staff, we never could figure out exactly why Bennett held the bill, although if the bill had said that it applied only to English-language documents, he probably would not have objected to it. Despite our best efforts, including help from two law professors, one at Brigham Young University and one at the University of Utah, we failed to move Bennett to lift his hold. Holds don't happen in the House; it's a peculiarity of the "gentlemanly" tradition in the Senate that holds are respected. Even if it's likely that a bill would pass on the Senate floor, if there's a hold, it doesn't move. So the 111th Congress closed with no plain-language act in place.

Early in the 112th Congress (which started in January 2009), both sponsors from the previous Congress reintroduced their bills. Again the House version passed, 386 to 33, and again the Senate version was held by Bennett. Fortunately for plain language in the government, Bennett was up for reelection. His party did not select him to run that year because his politics did not pass muster in the extremely conservative political climate of the day. And so he became a lame duck. Then Braley did the unconventional: he crossed the Mall and met with Bennett. And after Braley made some relatively minor changes in the bill, Bennett lifted his hold. Once the act came to the Senate floor, it passed unanimously. It was signed a few days later by President Obama.

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(The Plain Writing Act of 2010 *continued from page 2)*

The Plain Writing Act defines "plain writing" to mean writing that is clear, concise, and well organized, and that follows other best practices appropriate to the subject or field and the intended audience. The act covers both paper and electronic information. Although it does not apply to federal regulations (there were political obstacles), it applies to any other document that

(1) is necessary for obtaining any federal-government benefit or service or for filing taxes;
(2) provides information about any federal-government benefit or service; or
(3) explains to the public how to comply with a requirement that the federal government administers or enforces.

To achieve its purpose, the act sets out a series of steps that each agency must take. Finally, it requires the Office of Management and Budget to develop and issue guidance on implementing the act. In a rather unusual move, OMB designated the U.S. federal group that advocates for plain language[1]—the group that originally created the Center for Plain Language—rather than an established agency as the interagency working group to help with developing guidance. And that guidance was issued in April 2011.[2]

What a great victory! After a relatively short campaign (starting in 2006), we had a law supporting plain language in the federal government. We achieved that with a lot of help from other folks who believed in the importance of clear government communication—and without any paid lobbyists. At a reception celebrating the act's passage, one of the major staffers from the House told us that we had been very effective in our dealings with Congress because we knew what we were talking about, we obviously cared deeply about the issue, we were flexible, and we kept coming back time and again.

But we all know this is just the beginning. Federal-agency writers are not going to be converted to plain language overnight. Indeed, most of them don't have the skill to write in plain language, so the government faces a massive training task. Some agencies will do well on their own, but many will have to be watched, helped, and prodded. That's the next job for the Center for Plain Language, but it's also a job for everyone subjected to poor government communications. So the next time you get some annoying, poorly written, convoluted document from the government, send it back. And explain that it doesn't comply with the Plain Writing Act of 2010.

### Endnotes

1 http://www.plainlanguage.gov.
2 http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf.

* Reprinted from 52–53 *Michigan Bar Journal* October 2011.

## In This Issue



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| Winter | January 15 |
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(President's Column: When Enough Is Enough *continued from page 1)*

in the complaint that the lower court had noted. The district court cited many defects in the second amended complaint, including "a staggering and incomprehensible 345-word sentence." *Id*. at 7. A copy of that sentence is included at the end of this column; it illustrates vividly the kind of legal writing that Scribes is out to stop. The district court was out to stop it too; it dismissed the complaint with prejudice.

Attorney Maksym filed an appeal with the Seventh Circuit, claiming that the district court had erred and either should have found the complaint to be adequate or should have allowed still another amended complaint. The circuit court affirmed the district court's dismissal with prejudice. It, dishearteningly, noted that "the unfortunate reality [is] that poor writing occurs too often in our profession, but Maksym's complaint is far outside the bounds of acceptable legal writing." *Id*. at 13 n. 7.

Among the problems that the court noted with the complaint were "its rampant grammatical, syntactical, and typographical errors [that] contributed to an overall sense of unintelligibility." *Id*. at 13. Over several pages it detailed the lack of punctuation, failure to follow the directions of the court to correct the deficiencies, "gibberish" passing as legal writing, and grammatical and syntactical errors.

Apparently the attorney had not learned his lessons from the trial-court experience. The circuit court stated that he had "failed to file a reasonably coherent brief on appeal. All the deficiencies that plagued the various versions of the complaint also infected his briefs here." *Id*. at 21. He had cited 81 cases, but "almost all of them are completely irrelevant to the issues presented here." *Id*.

The Seventh Circuit had enough too. It affirmed the district court. It also ordered Maksym to show cause why he should not be removed from the bar of the Seventh Circuit or otherwise sanctioned. It directed the clerk to send a copy of the opinion to the Illinois Attorney Registration and Disciplinary Commission "for action it deems appropriate." *Id*.

This was an extreme case, of course, but there is reason to applaud the Seventh Circuit. Bad writing harms clients. Here, the client lost the opportunity to pursue the case because of the attorney. But bad writing also harms others. It imposes costs—"externalities," if you will—on others that are unfair and destructive. There should be consequences to inflicting these costs on the legal system. It was right to call foul. Enough really is enough.

The court cited this 345-word sentence, noting that all errors are in the original:

> "That pursuant to the RICO Act, Defendants extortive activities constituted a Pattern of Racketeering activity and conspiracy involving violations of 1956(a)(1)(B)(ii), and 18 U.S.C. § 1341 (wire fraud—the use of interstate mail or wire facilities, here telephone and facsimile transmissions), or the causing of any of those things promoting unlawful activity), and 18 U.S.C. § 1951 (interference with commerce and extortion by using and threatening to use legitimate governmental powers to obtain an illegitimate objectives under color of official right by wrongful plan, extortion, intimidation and threat of force and/or other unlawful consequence and through fear and misuse of there office to obstruct, hinder, interfere with, and/or affect commerce and the use and enjoyment of Plaintiffs' property and obtaining, as uniformed public officials payment for un-wanted services to which they were not entitled by law, attempting to conceal from the United States of America their true and correct income and the nature thereof so obtained from Plaintiffs in order to attempt to evade paying lawful taxes thereon in violation of 26 U.S.C. § 7201, et. seq., thereby using the governmental powers with which they have been entrusted to gain personal or illegitimate rewards and payments which they knew or should have known were made and/or obtained in return for the colorable official acts as aforesaid, and knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity with the intent to promote the carrying on of specified un-lawful activity all in violation of RICO and the other laws set forth herein, inter alia, as well as acts chargeable under any of the following provisions of the laws of the State of Illinois 720 ILCS 5/33-3(d) (official misconduct); 720 ILCS 5/12-11 (criminal home invasion); 720 ILCS 5/19-4 (criminal trespass to a residence) 720 ILCS 5/19-4); (theft 720 ILCS 5/16 (a)(1)&(3) by knowingly obtaining or exerting unauthorized and/or through threat control over Plaintiff's property as aforesaid."

# Ambiguity

by Richard Wydick

*Scribes board member Dick Wydick recently presented this at a conference of legal-writing instructors. We're pleased to publish it.*

As legal research and writing teachers, you are a very lucky group, for two reasons. Number One: You have the privilege of teaching first-year law students. That's when they are the most fun, the most enthusiastic, the most ready to learn. Number Two: You have the privilege of teaching them the two most useful skills in the entire curriculum—how to research the law, and how to write the kinds of things lawyers write.

In teaching them research, you will probably send them off to the library with some exercises, such as this one: "In the bound volumes of West's California Codes, find a statute that tells you the consequences of sneaking out of your hotel with your suitcase, without paying for last night's dinner and this morning's breakfast."

When your students finally find that huge set of blue books, they will eventually come up with the California Penal Code section:

> 1. Any person who obtains any food, fuel, services, or accommodations at a hotel, inn, restaurant, boardinghouse, lodginghouse, apartment house, bungalow court, motel, marina, marine facility, autocamp, ski area, or public or private campground, without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an hotel, inn, restaurant, boardinghouse, lodginghouse, apartment house, bungalow court, motel, marina, marine facility, autocamp, or public or private campground by the use of any false pretense, or who, after obtaining credit, food, fuel, services, or accommodations, at an hotel, inn, restaurant, boardinghouse, lodginghouse, apartment house, bungalow court, motel, marina, marine facility, autocamp, or public or private campground, absconds, or surreptitiously, or by force, menace, or threats, removes any part of his or her baggage therefrom with the intent not to pay for his or her food or accommodations is guilty of a public offense punishable as follows . . . .[1]

Remember that the students who find this statute are very bright and very impressionable. This may be the first piece of real law they have ever seen. They may say, "So that's the way it is done here—that is how the law is written!"

If you could ever track down the lawyer who drafted that statute—and you know it was a lawyer, don't you?—you might ask that lawyer why he or she wrote it that way.

The lawyer would reply something like this: "We lawyers must write in a way that avoids any possible ambiguity. We must write with precision so that our meaning is absolutely clear."

Avoiding ambiguity is a laudable goal—but most of the time, a lawyer can do it easily, without creating the kind of mess you see in Penal Code 537. Let's look at several common causes of ambiguity and how to avoid them.

Please read item 2:

> 2. News headline: First Aid Squad Helps Dog Bite Victim.[2]

The little ambiguity that makes item 2 laughable occurs in the words *dog* and *bite*. When you first read the headline, your mind treats *dog* as a noun and *bite* as a verb. But here the noun and verb function together as an adjective—to modify the noun *victim*. My friend Bryan Garner calls those *phrasal adjectives*: two or more words that function together as an adjective. To fix the ambiguity, all you need is a hyphen between *dog* and *bite*.

Bryan's handy rule of thumb is to always hyphenate phrasal adjectives. You can think of many other examples. For instance, "small business lobbyists" makes you think of wee little lobbyists. *Small business* needs a hyphen.

Now read item 3:

> 3. News headline: Demonstrators Rally for Peace in London.

The momentary ambiguity in item 3 is caused by the modifier "in London." For a moment, at least, the reader can't tell what's happening in London. Is it more rioting in the streets? Or is it a peace rally?

You can avoid that kind of ambiguity with another handy rule of thumb: put the modifier as close as you can to the term you want to modify.

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(Ambiguity *continued from page 5)*

So if it's a peace rally in London, you could say: "Demonstrators in London Rally for Peace."

You will see a similar example of the same thing in item 4:

> 4. Help Wanted: Stable hand to care for race horse who does not smoke or drink.[3]

The modifier here is "who does not smoke or drink." It belongs right after *stable hand*, rather than after *race horse*.

Items 2, 3, and 4 don't create legal problems because they aren't in legal documents, and they are simple enough to spot quickly—that's why they make you chuckle rather than cringe.

But now read item 5:

> 5. If the shareholders do not approve the issuance of Class Two shares by August 31, the reorganization plan will be abandoned.[4]

The ambiguity here is what must happen "by August 31." Is it the shareholder approval, or is it the issuance of Class Two shares?

If that sentence appeared in a contract or a proxy statement or some similar legal document, it could cause an expensive dispute. Again, the ambiguity can be avoided by putting the modifier "by August 31" close to the term you want it to modify. If it's the shareholder approval, then you might revise the sentence to read:

"If, by August 31, the shareholders do not approve, [etc.]"

Please read item 6:

> 6. The price adjustment clause cannot be invoked due to the increased cost of gasoline.

The ambiguity lies in putting the "due to" clause at the end of the sentence.

One possible meaning is "An increase in the cost of gasoline is not grounds for invoking the price-adjustment clause."

The second possible meaning is "Ordinarily you could invoke the price-adjustment clause, but the increased cost of gasoline prevents you from invoking it now."

If you wanted to express that second meaning without ambiguity, you could move the "due to" clause to the front of the sentence, like this:

"Due to the increased cost of gasoline, the price-adjustment clause cannot be invoked."

The examples we've seen thus far have all been ambiguities caused by syntax—meaning the way the words are put together to form a sentence. Those are called *syntactic ambiguities*.

Now we're going to look at a different type, called *semantic ambiguity*—ambiguity that's caused by a poor choice of words.

Please read item 7:

> 7. Free car wash. This coupon expires on August 26, 2011.

Today is August 26. Suppose you drive to the car wash with your little coupon in hand. Are you going to get a free car wash?

Or is the car-wash guy going to say, "Your coupon expired today. Sorry."

The semantic ambiguity lies in the little preposition *on*. It doesn't tell us whether the coupon expires at the beginning of August 26, or at the end of August 26.

Bearing in mind that the purpose of the coupon is to build good customer relations, you might pick a better preposition, and make the statement positive rather than negative. For example, it could say: "Valid through August 26."

Now read item 8:

> 8. I bequeath the sum of $2,000,000 to my nephew Fergus, provided that he abstains from using alcohol and/or addictive drugs until he is past eighteen years old.

Item 8 contains two semantic ambiguities. The first one is the term *and/or*. Let's suppose that nephew Fergus makes it to age 18, and he's never touched a drop of alcohol. But he's a hopeless crackhead. Do you think the rich uncle would want Fergus to get the money? Probably not. The rich uncle didn't mean *and/or*—he meant *and*.

If a lawyer really needs to express both the conjunctive and the disjunctive, there's an easy way to do that without ambiguity. You say "A or B or both."

Here's an easy rule to teach your students: never, ever use the term *and/or*.

The second semantic ambiguity in item 8 is the expression "past eighteen years old." When will Fergus be past 18?

– on his 18th birthday?

*(continued on page 7)*

(Ambiguity *continued from page 6)*

– the day after his 18th birthday?

– on his 19th birthday?

Chances are, the rich uncle never saw the problem when he read and signed the will. But his lawyer should have seen it. They could have avoided the semantic ambiguity by saying "until his 18th birthday."

Now read item 8 and do two things: (1) find the ambiguity, and (2) decide whether it is a semantic ambiguity (because of a poor choice of words) or a syntactic ambiguity (because of a poor arrangement of words).

> 9. The court may order the deponent to produce "any designated book, paper, document, record, recording, or other material not privileged."[5]

What you see in item 9 is one of the Federal Rules of Criminal Procedure before their recent revision. The ambiguity is syntactic because it's caused by the way the words are arranged in the sentence. The ambiguity lies in the modifier at the end of the sentence: "not privileged." The reader can't tell how far back in the sentence that modifier stretches.

Does it stretch only to the last term, *other material*?

Or does it stretch all the way back in the sentence, to apply to recordings, records, documents, papers, and books?

That's a very common kind of ambiguity—when you have a modifier before or after two or more items to which the modifier could be applied.

The original drafters of the Criminal Procedure Rules were trying to limit discovery to nonprivileged material, no matter what its form.

If you read item 10, you will see how the revisers of the rule solved the ambiguity. They simply moved the modifier to the front of the series:

> 10. The court may order the deponent to produce "any designated material that is not privileged, including any book, paper, document, record, recording, or data."[6]

Finally, please read item 11 and do two things: (1) find the ambiguity, and (2) find a quick and easy way to fix it.

> 11. Every student in the seminar must write three-page papers on each of the following topics: relevance of "original intent," Chief Justice Roberts's judicial restraint doctrine, the First Amendment and the right to die.

The ambiguity is this: How many three-page papers must a seminar student write? Is it four? Or is it only three?

In other words, does the student's third paper have to be about the First Amendment generally, covering freedom of speech, freedom of the press, freedom of religion, and so forth? And then does the student have to write a fourth paper about the right to die?

Or, on the other hand, maybe the student has to write only three papers, the last one being about the right to die, as one aspect of the right to personal autonomy, as found in the penumbra of the First Amendment?

Some English teacher back in grammar school probably taught you that when you list a series of items, you must put a comma after each item, but that it is permissible to omit the comma after the next-to-last item if you wish.

That advice is okay for people whose writing will be confined to shopping lists and works of fiction. But it's bad advice for lawyers and other technical writers because occasionally the elimination of the comma after the next-to-last item can create an ambiguity—as it does in item 11.

I suggest that you teach your legal-writing students always to use the comma after the next-to-last item in a series. The comma doesn't take much ink. It doesn't occupy much space. And it takes less time to put it in than to stop and ponder whether you could omit it without risking an ambiguity.

## Endnotes

1. Cal. Penal Code § 537(a) (West 2010).
2. Steven Pinker, *The Language Instinct* 133 (1994).
3. *Cf.* Jay Leno, *Tonight Show* (NBC Feb. 16, 2011).
4. *See* Kenneth A. Adams, *A Manual of Style for Contract Drafting* 220 (2d ed. 2008).
5. Fed. R. Crim. P. 15(a) (before revision), *cited in* Joseph Kimble, *Lifting the Fog of Legalese* 122 (2006).
6. Fed. R. Crim. P. 15(a)(1) (2010).

## Member News

**Lucian Pera** is the new treasurer of the American Bar Association. Mr. Pera was installed as treasurer at the close of the ABA's annual meeting held August 4–9 in Toronto, Canada. Mr. Pera will serve a three-year term. The ABA is the largest voluntary professional organization in the world. Mr. Pera is a partner in the Memphis office of Adams and Reese LLP.

**Otto Stockmeyer's** article "Zombie Verbs and Vampire Nouns," which appeared in the spring 2011 issue of *The Scrivener*, made SSRN's Top Ten list in August, with 48 downloads!

Cornell University announced that **Frank Wagner**, one of only 16 people to serve as Reporter of Decisions of the Supreme Court, has returned to Cornell to mentor law students at the Legal Information Institute. Mr. Wagner, who retired from the Court in September 2010, now works with students on the LII's *Supreme Court Bulletin*, a student-written and -edited online publication that offers commentary on all Supreme Court cases before they are argued. Nearly 50,000 people read each issue.

## Scribes to Cosponsor International Conference in Washington, D.C., May 21–23, 2012

Scribes will cosponsor a conference with Clarity and the Center for Plain Language May 21–23, 2012. Clarity is an international organization dedicated to clear writing in law, government, and business. The Center for Plain Language, located in Washington, D.C., is a national organization that promotes plain language in government and that spearheaded passage of the Plain Language Act in 2010. For more information, go to https://sites.google.com/site/claritydc2012/home.

## New Members

James H. Agger (Ardmore, Pennsylvania)
Adrienne Brungess (Sacramento, California)
Frank Cruz-Alvarez (Miami, Florida)
Margaret Curtiss Hannon (Chicago, Illinois)
Greg Korbee (The Hague, Netherlands)
Scott Levinson (Brooklyn, New York)
Hether MacFarlane (Sacramento, California)
Lisandra Matos (Houston, Texas)
Jeremy McGuire (Palmerston North, New Zealand)
Mary-Beth Moylan (Sacramento, California)
Marjorie Nicol (Houston, Texas)
Lee A. Peifer (Atlanta, Georgia)
David Pybus (Houston, Texas)
R. Jason Richards (Pensacola, Florida)
Gene Roberts (Dallas, Texas)
Olga Serafimova (Santa Fe, New Mexico)
Elaine M. Stoll (Fort Thomas, Kentucky)
Timothy Sutton* (Sun Valley, California)
Todd Taylor (Greeley, Colorado)
Grace Van Houten (Jacksonville, Florida)
Michael Todd Walker (Knoxville, Tennessee)
Maureen Watkins (Sacramento, California)
Christian Wong (Markham, Ontario, Canada)

* Student member.

## New Sustaining Members

Cynthia Adams (Indianapolis, Indiana)
Ann Taylor Schwing (Sacramento, California)
Peter G. Walsh (Miami, Florida)

# Scribes 2011 Luncheon Remarks by Rt. Hon Beverley McLachlin, P.C. Chief Justice of Canada

In preparing my remarks on the topic of legal writing, I was reminded of something Fred Rodell, Dean of Yale Law School, wrote back in 1938: "There are two things wrong with most legal writing. One is style. The other is content."[1] For fear of proving Dean Rodell correct, I won't attempt to describe myself as an expert in legal writing. Yet it is undeniable that judges do know a thing or two about legal writing.

The judge's life is a life of struggle—the struggle to decide fairly between contending parties and positions, and the struggle to explain the reasons for that decision. The two struggles are interrelated, part of the single indissoluble activity of judging. Through writing and rewriting, judges arrive at the right decision. Errors are revealed. Fallacies are exposed. Judges sometimes say of a result they thought they would get to: "It won't write." The process of articulating the reasoning has changed the result. Moreover, there is truth in the suggestion that bad decisions and bad reasons are often found together. If the content is bad, so the style will often be bad. And if the style is bad, so the decision will be suspect. *The Economist* reminds us in its pocket guide that clear thinking is the key to clear writing.[2] In fact, clear thinking and clear writing are one and the same, two facets of the single indissoluble process of judging. For it is through writing that we think.

It is from this perspective, as a judge who relies largely on my writing to express my legal views and opinions, that I wish to offer a few words on the subject of legal writing.

Allow me, then, to give you the news, both good and bad, about legal writing.

The bad news is that legal writing—this vital activity that we all must do—is difficult to do well. Legal language is notoriously foggy. The struggle of the legal mind to encapsulate all detail, to foresee every eventuality, all the while sounding learned and authoritative, too often frustrates the basic goal of clear communication. What Canadian playwright Mavor Moor said of lawyers goes for many legal writers as well:

> The lawyer is your friend because
>
> He guides you through the maze of laws
>
> In fact we write them round about
>
> So only we can make them out.[3]

In *Plain English for Lawyers*, American lawyer Richard Wydick says this of legal writing:

> We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has . . . four outstanding characteristics. It is (1) wordy, (2) unclear, (3) pompous, and (4) dull.[4]

The good news is that legal writing is getting better. As a major consumer of the product, I know whereof I speak. Take the example of judgments. In the old days, reasons were often little more than a cryptic collection of observations and legal maxims. It was sometimes difficult to make out what facts the judge had found and what law the judge had applied. What was once the norm is now the exception.

Perhaps as a result of a desire by the legal profession to become more accessible, or the introduction of legal-writing courses in the curriculum of many law schools, legal writing has, in general, become simpler, clearer, and remarkably devoid of Latin maxims and hackneyed phrases.

But rather than focus on details this afternoon, I would like to take a step back and think about the process of writing as a whole. I have been a judge for just over 30 years, and I have sat on every level of Canadian courts. All that time, I have struggled to produce clear and correct legal judgments. I have broken all the rules you can think of, and I have often failed in my ultimate goal. But along the way, I have arrived at some certainties on how best to approach the task of legal writing.

At the risk of sounding like the Dalai Lama, one might call them the Four Understandings:

1. Understand the dispute.
2. Understand your role.
3. Understand your audience.
4. Understand yourself.

## 1. Understand (and write about) the dispute

Understand the issues before you and write about what happened. What gave rise to the legal dispute, the criminal charge, or a particular judgment? What is the context? In other words, what is this really about?

You cannot write about something, let alone make a decision about it, unless you understand the factual situation and grasp the legal issues before you. Some of the greatest jurists of our time have taken this as their cardinal rule.

Oliver Wendell Holmes famously opined: "The life of the law has not been logic: it has been experience."[5] Lord Denning gained renown by starting every judgment with the facts—the places and the people that told the story that lay behind the dispute. Who can forget the phrase "It was bluebell time in Kent," with which he began one judgment?[6] Or this kickoff: "Old Peter Beswick was a coal merchant . . . . All he had was a lorry, scales and weights."[7]

Understanding and articulating the context will help you frame the issues, get to the point, and avoid redundancies. In the case of writing judgments, it will ensure that the reasons not only read well, but are just.

## 2. Understand (and write for) your role

Before you put pen to paper or finger to keyboard, ask yourself this: what particular duties lie on you, be it as a lawyer, a judge, a professor, or a legal editor?

The main task of a trial judge is to set out the findings of fact, set out the principles of law to be applied, and explain how these lead to the conclusion reached. When I was a neophyte trial judge, a senior colleague gave me a piece of advice: "Fudge it up," he said; "they will never be able to appeal." I thought about that and in the end rejected his advice. My role, I decided, was to be as clear as possible about my findings and reasoning, precisely so that the Court of Appeal would be able to correct my error and do justice.

By contrast, the main task of the Supreme Court of Canada, the Court on which I sit, is to settle legal issues of public importance. To discharge this task as effectively as possible, we adopted a number of practices relating to judgment-writing for our particular job.

First, we work to build consensus, by reconferencing and leaving to another day nonessential issues that divide us.

Second, we strive to state the law as clearly as we can and give minimum guidance. We don't always succeed. But this is our constant preoccupation. The fact that we work in Canada's two official languages is of tremendous help in this regard. Translating a judgment from French to English, or vice versa, means that the precise meaning of each word and each sentence is examined. Often, it leads us to make further revisions.

Third, we try to write briefly. We decide what we have to, and we avoid analyses that add little to the final product. We do this by summarizing the facts much more briefly than in the past. Only the facts relevant to the legal issues need to be set out. Similarly, we summarize the judgments below briefly. The advent of technology means that they are readily available on the Internet if someone wants more detail. Finally, in the legal analysis, we avoid long recitations of authority and interruptions that distract from the logical line of our reasoning. We ask, first, last, and at every step along the way, whether every word, every sentence, every paragraph advances the march of the argument. That does not mean that the product is always short. Many issues may take many pages. But as Oliver Wendell Holmes once wrote: "The eternal effort of art, even the art of writing legal decisions, is to omit all but the essentials."[8]

Or to paraphrase Mozart in Peter Shaffer's *Amadeus*: "Precisely the number of words necessary; no more and no less."

## 3. Understand (and write for) your audience(s)

Legal writing, at its simplest, is an attempt to communicate. A writer is one who bridges the understanding gap between the author's mind and the recipients' minds and communicates. Any piece of writing that does not communicate is a failure, no matter how learned or gracefully phrased.

To communicate, you must know your audience and how they think. Gardening expert Irma Dombrusch has stated that the key to successful gardening is thinking like a plant. Same for writing—but not always an easy thing.

In my court, the audience is multiple: the parties, the parties' lawyers, intervenors, legal practitioners, legal

academics, the press, and the general public. For this reason, plain, clear, readily understood language is the only way to address these diverse audiences. The complexity of many cases makes the task difficult. Yet good judgment-writing—writing that communicates—demands that we do this.

Perhaps the late Chief Justice Brian Dickson said it best:

> Language is communication. People must be capable of understanding what we say. We, as judges, as insiders, should not use a specialized jargon like that of the law to talk only to other insiders, to other judges and members of the bar. The law of today has a broad consumer base. Our judgments touch the lives of all Canadians. They should convey meaning to all who read them, whether or not they are learned in the law. It is not a matter of pandering to illiterates. It is simply recognition of the obvious. When we talk to a broad audience and demand to be understood, we should use the language of simplicity, whatever difficulties this may entail in expressing the subtleties which constitute some of the pivotal considerations of law.[9]

### 4. Understand (and write for) yourself

The late Marvin Catzman of the Ontario Court of Appeal, in a lecture directed to trial judges entitled "What Does the Court of Appeal Want from Me?" had two pieces of advice for trial judges. First, they should make clear the facts found and the reasons for finding them. Then, they should "[f]orget about the Court of Appeal—the hell with the Court of Appeal—write your reasons the way you want to write your reasons."

I don't think Justice Catzman was inviting trial judges to abandon the rules of good writing. Nor was he urging them to write rambling, confused essays liberally laced with Latin and extraneous erudition. What Justice Catzman was saying was something more basic—something every good writer in every field of writing from poetry to fiction to journalism knows—write in your own voice. Or as William Shakespeare wrote, "To thine own self be true."[10]

I learned this the hard way. Over a long judicial career, I have tried to write like Oliver Wendell Holmes. I have tried to write like Benjamin Cardozo. I have tried to write like Viscount Sankey and Lord Denning and Brian Dickson. Sadly, it never works. Write what you believe, clearly and forcefully, as simply as you can, with the goal of communication. Your own voice will come through, and your judgments will ring true.

I return to where I began. Good legal thinking and good legal writing are one and the same. Follow the effective writing practices the experts offer. And remember the Four Understandings:

Understand (and write about) the dispute.

Understand (and write for) your role.

Understand (and write for) your audience.

Understand (and write for) yourself.

It was a pleasure to be here this afternoon. Thank you. Merci. And may all your writings be good ones.

### Endnotes

1 Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38 (1936).

2 The Economist, *Style Guide* 3 (Profile Books Ltd. 2005), *available at* http://www.economist.com/research/styleguide/index.cfm?page=673933.

3 Mavor Moore, "The Lawyer," in *And What Do You Do? A Short Guide to the Trades and Professions* 49 (Dent 1960).

4 Richard Wydick, *Plain English for Lawyers* 3 (Carolina Academic Press, 5th ed. 2005).

5 Oliver Wendell Holmes, *The Common Law* 1 (Little, Brown, and Co. 1881).

6 *Hinz v. Berry* [1970] 2 QB 40 at 42.

7 *Beswick v. Beswick* (1966) Ch. 538.

8 Robert M. Mennel & Christine L. Compston, eds., *Holmes and Frankfurter: Their Correspondence, 1912-1934* 40 (University Press of New England 1996).

9 Brian Dickson, Seminar on Judgment Writing 6 (address delivered to the Canadian Institute for the Administration of Justice, July 2, 1981).

10 William Shakespeare, *Hamlet* (act 1, scene 3).

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