

# Winning the War Against Legalese

REPUTATION<sup>ink</sup>

YOUR REPUTATION. **OUR EXPERTISE.**

# Agenda

- » History of legalese
- » Legalese traits
- » Plain language movement
- » Lawyers' arguments against plain language
- » Research supporting plain language
- » Content marketing
- » What clients have to say
- » Guidelines for losing the legalese
- » Your role as editor
- » Resources

“ *In the Nuts (unground) (other than Ground Nuts) Order the expression “nuts” shall have reference to such nuts, other than ground nuts, as would for this amending Order not qualify as nuts (unground) (other than ground nuts) by reason of their **BEING NUTS** (unground).”*

– *British regulation*



I'd like the steak with, near or adjacent to french fries, including but not limited to the mixed vegetables, accompanied by, concurrent with and at the same time as a beer.



# Why Do Lawyers Write and Speak the Way They Do?

- » Legalese arose from a time when using multiple languages enhanced clarity
  - *Free and clear – from freeo (old English) and cler (old French)*
  - *French influence of putting noun before adjective: attorney general, court martial, accounts payable, fee simple*
- » Printing press exacerbates the law's natural tendency to preserve old phrases, leading to formbooks and a common set of precedents



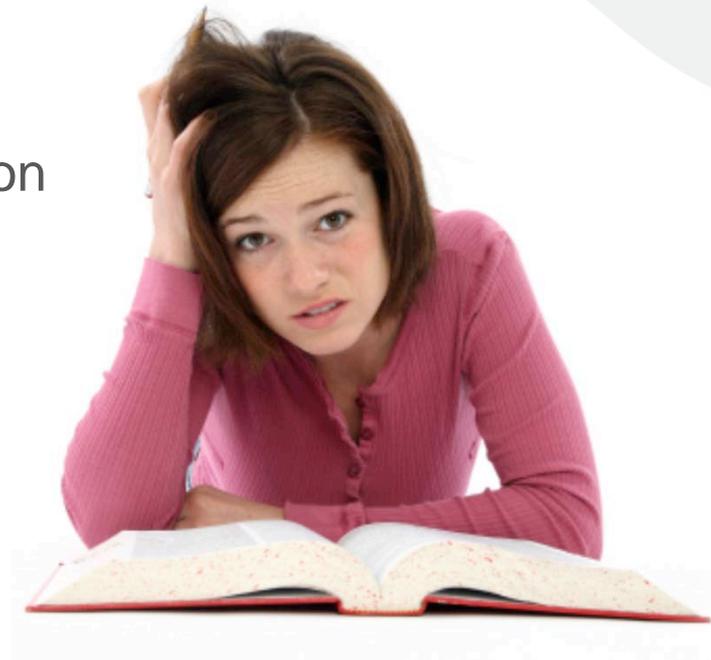
# Why Do Lawyers Write and Speak the Way They Do?

- » Precedent: “that which came before” – the key to how lawyers think
- » Linguistic oddities became set in stone, carefully preserved and passed from one generation to the next



# An Insidious Cycle

- » Start with:
  - *Writing well isn't easy*
- » Then:
  - *Plunge groups of mediocre writers into a complex field with its own mind-boggling jargon, rife with bloated expressions that displace everyday words*
- » Make law students pore over ream upon ream of tedious, hyperformal prose
- » Acculturate them to pomposity



# An Insidious Cycle

- » On the job, make them read poorly written material almost exclusively
- » What do you get?
- » Your average legal writer: wordy, stuffy, artificial, and often ungrammatical



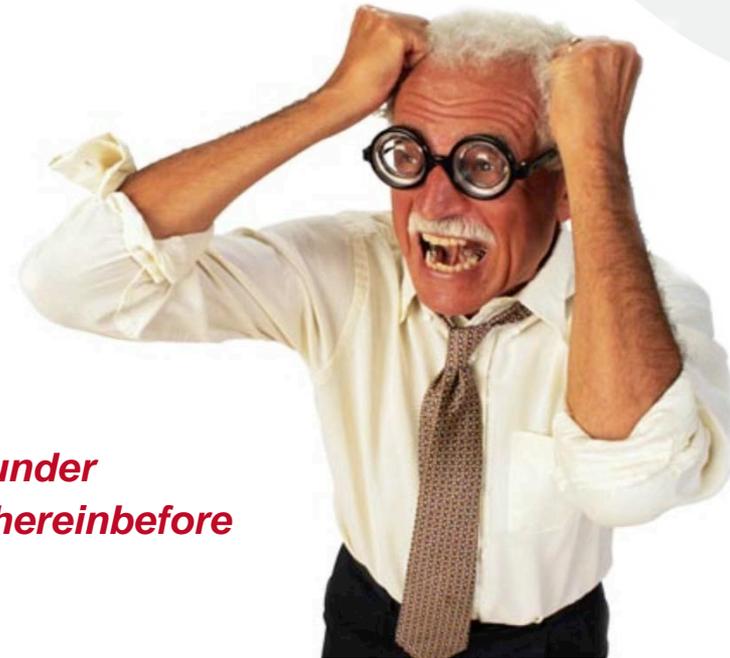
# Ooh Law Law.... Legalese Traits

- » Stilted, formalistic writing
- » Long words and long sentences containing multiple ideas
- » Archaic words
- » Passive voice
- » Illogical ordering of ideas
- » Has the appearance of extreme precision but often results in confusion, instead of precision



# What We Have Here is a Failure to Communicate

- » Nouns vs. verbs:
  - *Lawyers will bring a lawsuit instead of suing*
  - *Or they will make an application instead of applying*
  
- » Run-on sentences
  - *Clerks were traditionally paid by the page*
  - *Overextended sentences; semicolons*
  
- » Passive voice and nominalization
  - *Johnny tried to hit me. vs. An attempt was made by Johnny to assault me.*
  
- » Surplus verbiage:
  - *Where words: whereas, wherefore, whereunder*
  - *Here words: herein, hereunder, hereafter, hereinbefore*



# Sex, Material Misstatements of Facts, and Videotape

- » Using two, three or four words for one
  - *Devise and bequeath*
  - *Grant, bargain, and sell*
  - *Right, title, and interest*
  - *Make, ordain, constitute, and appoint*
  
- » Using many words when one is more understandable
  - *Sufficient number of = enough*
  - *That point in time = then*
  - *For the reason that = because*
  
- » Unnecessary preambles
  - *It is important to add that...*
  - *It may be recalled that...*
  - *In this regard it is of significance that . . .*
  - *It is interesting to note that . . .*

# The Plain Language Movement

- » Took hold in the U.S. in 1970s:
  - *Presidents Nixon, Carter and Clinton issue orders to use plain English in laws*
  - *Citibank decided, on its own initiative, to try out a plain language version of a promissory note*
  
- » By 1991, eight states have statutes encouraging plain language
  
- » 1998: SEC issues Plain English Handbook
  
- » In 2008, federal government passes Plain Language in Government Communications Act
  
- » October 2010, President Obama signs the Plain Writing Act of 2010, requiring federal government to write documents in simple language

# Citibank's "Revolutionary" Promissory Note

» This:

- *You can delay enforcing any of your rights under this note without losing them.*

» Replaced this:

- *No failure or delay on the part of the Bank in exercising, and no failure to file or otherwise enforce the Bank's security interest in or with respect to any Collateral, shall operate as a waiver of any right or remedy hereunder or release any of the undersigned may be extended or waived by the Bank, any contract or other agreement evidencing or relating to any Obligation or any Collateral may be amended and any Collateral exchanged, surrendered or otherwise dealt with in accordance with any agreement relative thereto, all without affecting the liability of any of the undersigned.*

# What is Plain Language?

- » Writing that can be understood at first reading by clients, lawyers and judges
- » Logically organized, concise and unambiguous
- » Uses normal or standard grammar, punctuation and capitalization
- » Conveys ideas with the greatest possible clarity
- » Is NOT a simplified version of the English language

# What is Plain Language?

- » Does NOT espouse brevity at the expense of substance, accuracy or clarity
- » Uses a tone and style that is professional yet appropriate to the circumstances
- » Takes account of the empirical research of the past 30 years about how the mind works – how people read and assimilate information

# Plain Versus Precision: A Fight to the Death

- » The precision camp
  - *Plain language is impossible because the law deals with complicated ideas that require great precision*
  - *The multiple subordinate clauses and technical jargon are there to describe highly complex relationships and stamp out ambiguity*
  - *I hereby certify vs. I certify – the hereby clarifies “I, right now, by this document, certify...”*



# Plain vs. Precision

## » The plain language camp

- *There is no structural reason why the law cannot be written in simple, clear language*
- *Clarity and precision are complementary goals*
- *If anything, plain language is more precise than traditional legal writing because it lays bare the ambiguities and uncertainties that convoluted language and unnecessary detail tend to hide*
- *Hereby rarely adds an iota of precision*
- *Said plaintiff is no more precise than the plaintiff*
- *In the event of default on the part of the buyer is no more precise than if the buyer defaults*

# Other Arguments: Legal Writing is Dense Due to Technical Terms

- » True technical terms or terms of art are a tiny part of most legal documents – maybe 2 or 3% of the words. The rest can be written in plain English.
- » Genuine legal terms of art are estimated at less than 100.
- » The Latin phrase *res ipsa loquitur* has become a term of art that lawyers use – conveniently and with a fair degree of precision – to communicate among themselves about tort law doctrine.
- » Other genuine terms of art:
  - *Allocution*
  - *Habeas corpus*
  - *Indemnity*
  - *Tortious interference with a contract*

# Other Arguments: We're Writing for Lawyers and Business Executives, Not Four Year Olds

- » Corporate Counsel's editorial guidelines
- » Avoid legal terminology as much as you can
- » Make every sentence as clear and succinct as possible
- » Imagine a CEO called you into his office two weeks before trial and wanted you to summarize the major strengths and weaknesses of a case. Write the way you would talk to him
- » The Economist Style Guide

# Other Arguments: We're Writing for Lawyers and Business Executives, Not Four Year Olds

- » In general, be concise
- » Try to be economical in your account or argument
- » “The best way to be boring is to leave nothing out”  
—Voltaire
- » “As a general rule, run your pen through every other word you have written; you have no idea what vigour it will give to your style.” —Sydney Smith

# Warren E. Buffett

- » For more than forty years, I've studied the documents that public companies file. Too often, I've been unable to decipher just what is being said or, worse yet, had to conclude that nothing was being said. If corporate lawyers and their clients follow the advice in this handbook, my life is going to become much easier.
- » There are several possible explanations as to why I and others sometimes stumble over an accounting note or indenture description....



# Warren E. Buffett

- » Perhaps the most common problem, however, is that a well-intentioned and informed writer simply fails to get the message across to an intelligent, interested reader. In that case, stilted jargon and complex constructions are usually the villains.



# Other Arguments: Plain Language Oversimplifies and Makes the Writer Appear Simple-minded

- » Not true: plain language is writing that is as simple, direct and economical as the circumstances allow
- » Plain language only looks easy
- » Plain language is about writing clearly and effectively for your intended reader
- » Have you ever heard anyone object that a piece of legal writing was too clear?
  - *The more complex the idea, the greater the need for a shorter sentence*

# Research: A Sentence Should Never Be Cruel and Unusual

- » Empirical research finds judges prefer plain language by wide margin.
- » Surveys in Michigan, Florida, and Louisiana conducted in 1980s and 1990s show that when judges and lawyers are shown two versions of a document, one in a traditional style and one in plain English, more than 80% of them prefer the plain English version.
- » Judges and their research attorneys rated the traditional versions as "substantially weaker and less persuasive than the plain English versions."
- » California study asks about writer's credibility, credentials and qualifications. Attorneys and judges believe plain language authors to be more believable, well-educated and to work for a prestigious law firm.

# Getting to the Point Trumps Pontificating

- » Rigorous, empirical 2010 study published in The Journal of the Legal Writing Institute finds:
  - *Judges prefer plain language to traditional legalese 66 to 34 %*
  - *Judges preferred informal language – with contractions and conversational tone – to legalese*
  - *Judge's age, gender and years of legal experience played no role in preferences*
  - *Whether in rural or urban districts played no role*
  
- » Some quotes:
  - *“Thinking and writing like a lawyer does not require arcane, stilted language.”*
  - *[The plain language sample was] “cleaner, leaner, and more effective and understandable.”*

# Content Marketing – Letting Clients Peek Under the Hood

- » Today, it is not what you know. It is not who you know. It is about who knows what you know.
- » Engagement/permission-based marketing vs. interruption marketing
- » Marketing technique of creating and distributing relevant and valuable content to attract, acquire, and engage prospects and win new business. The art of communicating with your customers and prospects without selling.

# Content Marketing – Letting Clients Peek Under the Hood

- » A firm's articles, website, proposals, sales presentations, research studies, brochures, books and other publications are the physical embodiment of its expertise.
- » When your published words are unclear, your expertise is guilty by association. Poor writing makes a firm's products—the expertise of their professionals—appear inferior.

# Wicker Park Group / Hubbard One Survey

- » “I want short, concise updates on new law.” – Executive Vice President, General Counsel
- » “I like alerts formatted with a simple list of headlines at the top that you breeze through quickly and click on if you want more information.” – Assistant General Counsel
- » “Provide helpful links to current case law, better-quality articles by subject matter experts.” – senior in-house lawyer
- » The section of a law firm website that matters most to in-house counsel by a wide margin is the lawyer bios section.

# Clients Speak Out

- » Committee on Corporate Counsel 2011 Annual CLE Conference
- » In-house counsel ask outside counsel to:
  - *Keep emails short and to the point*
  - *Use lengthy, analytical emails only when necessary*
  - *Send emails addressing a single point or making a concise, clear argument*
  - *Write descriptive subject lines*
- » Marketing Partner Forum, General Counsel Panel
- » “I want a one-paragraph email, not a glossy newsletter,” Rodner (GC of Medicis Corp) said. “There have only been a couple of times that the first firm that sent me an alert told me something I hadn’t already heard.”

# Deliver Us from Gobbledygook

- » Write and design the document in a way that best serves the reader
- » Resist the urge to sound formal
- » Omit unnecessary detail
- » Be concise: keep the average sentence length below 25 words
- » In most sentences, put only one main thought
- » Use mainly active voice
- » Use concrete words, not abstractions

# Deliver Us from Gobbledygook

- » Completely get rid of shall. Replace with must, may, should or will
- » Refer to people and companies by name. Imagine if novels used protagonist and antagonist. Similarly don't use plaintiff, defendant, appellant, appellee, lessor and lessee
- » Write in a familiar voice with familiar words: end not termination, hurry not expedite, explain not elucidate, use not utilize
- » Make everything you write speakable

# Gobble, Gobble, Gobble

- » Don't habitually use parenthetical shorthand names. Ever read a newspaper article that begins this way?
  - *A powerful Russian industrialist named Mikhail Khodorkovsky (hereinafter "the Industrialist" or "Khodorkovsky"), whose empire (hereinafter "the Khodorkovsky Empire") is under investigation....*
- » Yes you can! Begin sentences with And, But, and So. Good writers do it all the time. But legal writers lapse into Similarly, However, Consequently and Inasmuchas



# Gobble, Gobble, Gobble

- » Avoid nominalizations – act, don't take action; assume, don't make assumptions; conclude, don't draw conclusions
- » Use headings and topic sentences to summarize the main idea of paragraphs
- » Use lists and bullet points



# Lawyerisms

» They give writing a legal smell, but no substance. The real danger is commonplace legalisms:

- |                            |                                  |
|----------------------------|----------------------------------|
| • <i>Lawyerism</i>         | <i>Plain language</i>            |
| • <i>as to</i>             | <i>about, of, by, for, in</i>    |
| • <i>bring an action</i>   | <i>against sue</i>               |
| • <i>herein</i>            | <i>in this (agreement, etc.)</i> |
| • <i>inasmuch as</i>       | <i>since, because</i>            |
| • <i>in the event that</i> | <i>if</i>                        |
| • <i>said (adj.)</i>       | <i>the, this, that</i>           |
| • <i>same (pron.)</i>      | <i>it, them</i>                  |
| • <i>subsequent to</i>     | <i>after</i>                     |
| • <i>therein</i>           | <i>in it, in them, inside</i>    |

» “The green beans are excellent. Please pass said green beans.”

# Citations

- » Legal readers are used to citations and, frankly, are apt to skip over them
- » To the uninitiated, they are road bumps
- » Option 1: omit them altogether
  - *How important is it for my client to know the citation to the Texas Agriculture Code? Can't I just say Texas law or Texas statutes?*
  - *Does my client need to know that the case I am relying on is Fitzgerald v. Advanced Spine Fixation Systems, Inc., that it is found in volume 996 of the South Western Reporter, Second Series, page 864, and that it was decided by the Texas Supreme Court in 1999?*

# Citations

- » Option 2: Put them in footnotes. Or add: citations available at [www.lawfirm.com/article](http://www.lawfirm.com/article) or upon request to [alawyer@lawfirm.com](mailto:alawyer@lawfirm.com)
- » Option 3: Use shorthand
  - *According to a Texas case called Fitzgerald, the court would apply...*
  - *One qualification arises from a Texas Supreme Court case called Continental Casualty decided in 2000...*

# Your Role as Editor

- » If possible, get involved in the beginning, before content is written
- » Your status as a layperson is an asset. You have no vast body of legal knowledge to get in the way of the shape of the writing
- » If you can't follow an argument, a client probably won't either
- » If you have to read a sentence four times to get the sense of it, perhaps the client will have trouble there too

# Your Role as Editor

- » Justify your edits with an authoritative source:
  - *A Dictionary of Modern Legal Usage, Bryan A. Garner*
  - *Modern American Usage: A Guide, Wilson Follett*
- » According to the Custom Publishing Council, approximately half of all U.S.-based companies outsource a portion or all of their content activities to an outside expert publisher or journalist

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