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Getting To “Plain Language”

By Ellen E. Hoffman*

“There ought to be a law!” To every citizen who voices this sentiment, the answer is that there probably is a law, but they probably could not understand it because of how it is written. In fact, not only is there probably a law, but there are also a number of bureaucrats whose unenviable job is to explain that law to the public. The importance of that job is most evident when members of the public come before administrative agencies in response to notices that threaten monetary fines, license revocation, or some other loss of an individual’s rights. Frequently in these situations, the individual does not have the option of professional representation, requiring him or her to navigate the administrative justice system alone. The better the public understands the myriad laws and rules governing their daily lives, the less time and resources the government has to spend dealing with noncompliance. This is what “plain language” is all about.

While the benefits of “plain language” should be obvious, it has not become a universal priority, despite repeated calls for its use over the decades.¹ There are many reasons for this, not the least of which

* A Commissioner of the New York City Tax Appeals Tribunal

1. At the federal level, in a Presidential Memorandum dated June 1, 1998, President Clinton directed the heads of all federal executive agencies and departments to use plain language in all non-regulatory new documents by October 1, 1998, in all pre-existing non-regulatory documents by January 1, 2002, and in all new proposed and final regulations by January 1, 1999. Joanne Locke, *A History of Plain Language in the United States Government* (2004), <http://www.plainlanguage.gov/whatisPL/history/index.cfm>. President Clinton also urged them to consider rewriting existing regulations “when you have the opportunity and resources to do so.” *Id.* As recently as December 2008, David Cay Johnston called for a plain language initiative at the IRS under the Obama administration. David C. Johnston, *Change and the IRS*, 121 TAX NOTES 9, 1067 (2008).

is competing demands on government resources. The consequences, however, of *not* adopting plain language can be harsh. In *Walters v. Reno*, the court held that notices used by the Immigration and Naturalization Service (INS) in enforcing the document fraud provisions of the Immigration and Naturalization Act of 1990 were so densely written and complex that they effectively deprived aliens of their constitutional due process rights.²

Not only did the court order the INS to stop using the offending forms, but it also required the INS to: (i) revise the forms; (ii) notify, individually and through a publicity campaign, all possible members of the affected class of their rights under the order; (iii) refrain from deporting aliens under the relevant provision until class members had an opportunity to reopen their cases; (iv) with certain exceptions, reopen cases for every class member alien who had received a final order of deportation; (v) make arrangements for class members outside the United States to reopen their cases; and (vi) recharge other class member aliens who had not yet received final deportation orders.³

An examination of the reading skills of the general population puts the magnitude of the task of converting government writing to “plain language” into perspective. The 2003 National Assessment of Adult Literacy (2003 NAALS Survey)⁴ assessed the English literacy of 18,000 adults (sixteen years old or older) in three categories of reading material: prose (*i.e.*, continuous text such as a newspaper or brochure); document (*i.e.*, non-continuous text such as a job application, schedule, or labels); and quantitative (*i.e.*, computations using data in other materials.) The average score out of 500 in the prose category was 275, and in the document category it was 271. The 2003 NAALS Survey does not equate these scores with a particular academic grade reading level, rather it associates different scores with various practical reading skills. For example, a score of 284 in the prose category is equivalent to the ability to understand the work experience required for a specific job from the information in a

2. *Walters v. Reno*, 145 F.3d 1032, 1038-39 (9th Cir. 1998), *cert. denied*, 526 U.S. 1003 (1999).

3. *Id.* at 1042-43.

4. The survey was conducted by the National Center for Education Statistics of the U.S. Department of Education. See National Assessment of Adult Literacy, http://nces.ed.gov/naal/kf_demographics.asp (last visited Mar. 4, 2009).

newspaper want ad. A score of 269 in the document category is equivalent to being able to find the time a television program ends from a newspaper television schedule. How can the government make parking tickets, tax bills, eviction notices, hearing applications, and administrative law judge orders understandable to someone who is barely able to find *Wheel of Fortune* in a television schedule?

The answer is "plain language." "Plain language" means drafting effective government documents by using easily understood words, correct grammar, a direct writing style, and clear presentation. If one had to distill the principles of plain language into a single axiom, it would be: "Keep it simple and short" (K.I.S.S.). To quote Rabbi Hillel, "everything else is commentary."⁵

Putting government documents, however, into "plain language" is harder than it sounds. To begin with, the laws underlying government documents are complex. There also may be regulations and court decisions interpreting those laws, adding more layers of complexity. If the instructions for completing tax returns are hard to understand, try reading the Internal Revenue Code sections on which they are based! Moreover, government employees are so familiar with the subject matter of the documents they create that what may appear perfectly clear to them, may be incomprehensible to outsiders.

The first step in putting government documents into "plain language" is to look at the document. Who is it for? Is the target audience the general public or a specific group of users? If the users can be narrowly identified, the document can be tailored to their reading skill levels and their familiarity with the subject matter. But, if the document is to be widely used by a broad spectrum of readers, it should be written for the lowest reading level necessary. If there are multiple types of users with different needs, the author should consider creating different versions of the same document for each group. The potential downside of this approach is that a user might get the wrong version, but clear headings and instructions on the forms can minimize that risk. A litigant's route through an administrative justice process usually begins with filing a protest of some government action. To protect litigants' rights, the government drafter of the protest form must ensure that an individual with no prior experience with the protest process can properly file the form.

5. *Babylonian Talmud*, tractate Shabbat 31a.

Members of the public who interact with government can be divided into “voluntary” and “involuntary” users. Voluntary users are members of the public who come to a government agency for information or to apply for jobs, licenses, or benefits. Involuntary users are members who respond to some agency bill or notice or who comply with a government mandate, such as filing a tax return. While some voluntary users may be intimidated by having to deal with the government, it is the involuntary user who is more likely to be anxious, frustrated, and impatient, so it is especially important that forms and documents for involuntary users be user-friendly. It is safe to say that individuals coming into the administrative justice process are doing so involuntarily. “Plain language” information can ease the anxiety of novice litigants.

In his preface to a Securities and Exchange Commission publication, “A Plain English Handbook: How to create clear SEC disclosure documents,”⁶ Warren Buffet writes:

Write with a specific person in mind. When writing Berkshire Hathaway’s annual report, I pretend that I’m talking to my sisters. I have no trouble picturing them: Though highly intelligent, they are not experts in accounting or finance. They will understand plain English, but jargon may puzzle them. My goal is simply to give them the information I would wish them to supply me if our positions were reversed. To succeed, I don’t need to be Shakespeare; I must, though, have a sincere desire to inform.⁷

I agree but I suggest that, instead of addressing yourself to your adult siblings, you draft documents as if you were explaining the subject to your teenage son or daughter. Even the most intelligent adolescents have a limited attention span for anything you are trying to say. This will force you to make your point as efficiently as possible.

6. Nancy M Smith, *A Plain English Handbook: How to Make Clear SEC Statements 2* (Office of Investor Education and Assistance, SEC) (1998).

7. Warren E. Buffett, *Preface* to Nancy M Smith, *A Plain English Handbook: How to Make Clear SEC Statements 2* (Office of Investor Education and Assistance, SEC) (1998).

After identifying the users of a document, the author should ask next, "What is it for?" What is the document? Is it a general information brochure to inform the reader or a hearing application to collect information from the reader? If the former, what does the reader need to know? If the latter, what does the government want to know? The author should make a list of the important information to be provided or collected and then organized in descending order of importance. Regardless of the government's efforts at "plain language," a user's focus on the document will diminish as he or she reads through it, and some users may stop reading altogether before the end. The author should structure the form or document so that the most important items, such as deadlines, are at the beginning. Keeping in mind the newspaper maxim of "who, what, where, why, and when" can be helpful in prioritizing information.

In organizing information in a document, not only should the most important information come first, but it should also appear in a logical order. For example, steps in the protest process should appear in the order in which they must be taken.

Many guides to writing in plain language recommend making the document personal by referring directly to the reader as "you" and the government as "we." I do not disagree with this approach, but I caution that to be effective, the personal approach must be used consistently. A one-page notice that arrived in my in-box several months ago contained the following paragraph:

Section 55-a of the New York State Civil Service Law permits municipalities to employ persons, who have been certified as physically or mentally disabled, in civil service positions on a non-competitive basis. This provision is implemented by the City of New York through the 55-a Program, which is administered by the New York City Department of Citywide Administrative Services. *You must be certified as being physically or mentally disabled and qualified to perform the duties of the job.*⁸

8. Dep't of Citywide Administrative Services, *New York City 55-a Program for Qualified Persons With Disabilities* (2009) <http://www.nyc.gov/html/dcas/html/resources/55a.shtml> (emphasis added). Several of the examples I have included in this article come from New York City

The last sentence was the ONLY sentence in the document directed at the reader personally. The effect was more confusing than communicative. On a similar note, when using the “personal” style, be sure that the reader is in fact the person referred to as “you.” If a form might be completed by a litigant or his employee, be sure that addressing the user as “you” will correctly refer to all possible readers.

In constructing a form to be completed by the user, there is often a conflict between putting the instructions for each line or section close to the space to be filled in and presenting more detailed instructions on a separate page. Including an instruction with the line to be completed makes the form longer, but increases the likelihood that the user will read the instruction. Having instructions on a separate page allows the form to be shorter, but increases the risk that the user will not read the instructions. I recommend a combination of both. Short forms are preferable because pages cannot be separated and the user is more likely to complete the entire form. But keeping forms to a single page usually requires moving some instructions to a separate page. Double-sided printing allows instructions to appear on the same sheet as the form, although not on the same page.

One way to keep forms short is to avoid asking for information more than once, such as the user’s name and address. This can lead to frustration and increase the likelihood that the user will not complete the entire form. Use a “same as above” checkbox or similar device if necessary. If duplicate information is needed on succeeding pages to prevent pages from being lost if separated, keep the repetition to a minimum. If the form requires duplicate entries because the internal processes require the form to be separated, change the internal process to allow for a more user-friendly form; the user should not have to conform to the procedures.

Keeping documents short is an important goal in getting to plain language, but it is not the only consideration. A balance is necessary

documents. This is solely because these are the documents most likely to come to my attention. The New York City Mayor’s Office of Adult Education and the Mayor’s Office of Immigrant Affairs have issued “Easy-to-Read NYC: Guidelines for Clear and Effective Communication” *See* Easy-to-Read NYC (2009) <http://www.nyc.gov/html/oath/pdf/Easy-to-Read%20NYC.pdf>. These offices provide training on plain language to other City agencies.

between keeping a document short and making sure the user has all the information he or she needs. The critical information needed by all or most users of the document should be included. The users should not have to look elsewhere for that information; they probably will not bother. Relevant definitions and deadlines should appear in the document, not through cross-references to statutes. For example, telling the reader that he or she "must respond within the time limit applicable" under a particular statutory section is not helpful and will result in late responses. If some information is needed by only a small number of users, consider whether it can be handled with a reference to another document. If the information must be in the same document, consider putting it in a separate paragraph or text box with an appropriate heading, which will allow those readers who do not need that information to skip it.

After identifying the audience and necessary content for the document, the next focus should be on the specific words used. Use a vocabulary within reach of the typical reader. Avoid the use of bureaucratic jargon or "legalese." This rule applies as much to the forms and informational pamphlets provided to litigants at the beginning of an administrative review process as to the administrative law judge's determination issued at the end of it.⁹ By habit or design, administrative law judges frequently incorporate in their orders boilerplate language that is filled with jargon usually taken directly from a statute. That language is so familiar, that it is easy to forget how confusing it may be to the public. The following boilerplate language, included at the end of an order closing a business operating without a license, is a good example:

It is further Ordered, that any devices, items or goods sold, offered for sale, or available for public use or utilized in the operation of a business and relating to such illegal activity shall be removed, sealed or

9. When writing orders directed at litigants who may be self-represented administrative law judges should use plain language wherever possible. Administrative law judges writing legal opinions subject to review by courts of general jurisdiction are less concerned about communicating with a reader of limited literacy. Applying plain language writing concepts, however, can make an obscure administrative provision clear to an appellate judge and make the difference between affirmance and reversal.

otherwise made inoperable if such illegal activity is not discontinued within 10 days of the posting of this Order. Any perishable goods or food products seized by the Department pursuant to the within Order which cannot be retained without them becoming unwholesome, putrid, decomposed or unfit in any way will be disposed of pursuant to the provisions of Section . . . of the . . . Code.

An individual with limited English language skills receiving this order is unlikely to understand what will happen if he ignores the order. The need to follow statutory requirements should not outweigh the need to communicate with the self-represented litigant. The statutory reference at the end, especially, is of no use to the self-represented litigant. A short paraphrase of the relevant statutory requirement should replace statutory references, as in the following plain language version:

I further Order that if Mr. _____ does not stop operating the business without a license within 10 days after this Order is posted, the Department will remove and hold all of the property used in the business including all goods offered for sale, or make unusable any property that cannot be removed. The Department will throw away any removed food or other perishables that cannot be stored without spoiling and will send Mr. _____ a written notice within 24 hours after such items are thrown away.

If technical terms are unavoidable, they should be defined up front. A legal dictionary and thesaurus are essential tools for translating government-speak into plain language and both are available on the Internet. An acronym or abbreviation should never be used without previously writing out the full name of the organization or program. Consider the following example, contained in a bulletin and issued by an entity identified only as “NIMS,” advising state and local emergency personnel of the importance of using “plain language” to communicate across agencies:

It is critical that all *local responders*, as well as those coming into the *impacted area* from other jurisdictions and other states as well as the federal government, know and utilize commonly established *operational structures*, terminology, policies and procedures. This is what NIMS and the Incident Command System (ICS) are all about achieving *interoperability* across agencies, jurisdictions and disciplines.¹⁰

The bulletin never explains the italicized jargon in the quoted paragraph above, and in addition, it never explains what NIMS stands for.¹¹ Other kinds of defined terms used in documents also can make the text confusing. For example, the use of multiple defined terms in the following sentence taken from a determination in a building code violation case makes the sentence unclear:

The only issue here is whether the IO made a reasonable attempt to deliver the NOV to a person at the premises upon whom service may be made pursuant to article three of the CPLR where the IO unsuccessfully searched the first and second floors of the building for a building manager but did not inquire of any of the persons present on the sixth floor — the scene of an elevator incident the IO was investigating — whether such person was in the building at the time.

The "IO" is the issuing officer—the person who issued the "NOV," the notice of violation. The CPLR is the New York Civil Practice Law and Rules.¹² Although these terms were defined earlier in the decision, their use here remains confusing because the acronyms give no clues as to their meaning or definition. The

10. See Dep't of Homeland Security, *NIMS Alert* (2009) www.fema.gov/pdf/emergency/nims/More10Codes02-08-06.pdf (emphasis added).

11. *Id.*; see also Dep't of Homeland Security, *FEMA NIMS Resource Center* (2009) www.fema.gov/emergency/nims.

12 N.Y. C.P.L.R. (McKinney 2008).

sentence would be more comprehensible if “officer” and “notice” had been used instead of “IO” and “NOV.” Of course, the sentence would be even more clear if it was not as long, and if the reference to “a person . . . upon whom service may be made pursuant to article three of the CPLR” were replaced.

Government documents are not creative writing projects or law review notes. Consistent terminology should be used even if it appears monotonous. Using alternative terms such as “certificate,” “permit,” and “license” for the same instrument will confuse the reader. Everyday words with their most common meanings should be used. There is no extra credit for displaying vocabulary that might have gotten an 800 on the SAT. The following sentence appears in a supposedly plain language guide to the conflicts of interest rules applicable to New York City employees: “The reasons for such prohibitions are manifold.”¹³ This sentence has nothing to do with automotive mechanics. The use of “manifold” here is not appropriate for a reader with a literacy score of 275. “Many” would have been a better word choice.

Short, declarative sentences should be used. The more words in each sentence, the harder it is for a reader to follow. There are several ways to achieve this. First, eliminate unnecessary words. Writers of official documents often use long phrases to express a simple concept because they sound more erudite. Lawyers, including judges, are particularly prone to doing this. Examples of such phrases are: “under the provisions of” and “due to the fact that.” These can be replaced with “under” and “because.” Eliminating redundancies also removes unnecessary words. For example, “guns” and “firearms” are technically different terms, but for the purpose of creating a document on a voluntary weapon surrender program, a reference to “guns” would have been sufficient.¹⁴ Another common redundancy is: “costs and expenses.” A thesaurus can help you find one word to replace a redundant list. The boilerplate language quoted above from the business closure case contains several sets of

13 New York City Conflicts of Interest Board, *Ethics: A Plain Language Guide* to Chapter 68 (Jan. 2007) http://www.nyc.gov/html/conflicts/downloads/pdf2/PLG_2006_final_web.pdf. This guide was reissued in September 2008 without this sentence.

14. Maria Mindlin & Katherine McCormick, *Plain Language Works for Pro Per Litigants* (2007) http://www.transcend.net/pdg/PL_article_web.pdf.

redundancies. While colorful, the phrase "unwholesome, putrid, decomposed or unfit in any way" could easily be shortened.

Another way to avoid cluttered sentences is to substitute in active verbs for the noun forms. For example, use "comply with" instead of "in compliance with" and "refer to" instead of "make reference to."

Finally, using the active voice rather than the passive voice not only shortens a sentence, but also makes it more effective. Directing the reader to "call (111) 555-0000 for a free brochure with more information" is stronger than merely informing them that "a free brochure with more complete information may be requested by calling (111) 555-0000." Note also that the phrase "more complete" is redundant; either "more" or "complete" would have been enough.

Awkward sentence structure also makes a document harder to understand. Moving a dependent clause from the middle of a sentence to the beginning or end will make it clearer. The following sentence appeared in the "plain language" conflicts of interest guide quoted above: "For the most part, conflicts, under this law, are financial or political in nature."¹⁵ There are so many "plain language" problems with this sentence that it is hard to know where to begin. "For the most part" can easily be replaced with "most." Also, the commas around the phrase "under this law" are unnecessary. Finally, like all adjectives, the words "financial" and "political" describe the nature of the noun to which they refer, so the phrase "in nature," is superfluous. Rewriting the sentence as: "Most conflicts under this law are financial or political," makes it shorter and clearer.

As with all writing, using correct grammar and punctuation is essential. Incorrect grammar and punctuation are not just wrong, but they can change the meaning of the writing. If the document has legal implications, such as, an administrative law judge's order, bad grammar or a misplaced comma can have severe consequences. Administrative law judges often have to parse the meaning of poorly written statutes and regulations. If our legislative representatives were more effective writers, perhaps legal professionals would not need multivolume treatises on statutory construction.

Similar words like "affect" and "effect" or "persecute" and

15. *See id.* Unfortunately, this sentence survived the September 2008 rewrite of this guide.

“prosecute” are often misused. Dangling modifiers are also a common problem. For example, the placement of the phrase “as to where the property and building lines are located,” in the following order, makes the whole statement ambiguous: “The respondent shall have thirty days from the date of this order to submit either a certified survey, an affidavit from an architect, or a certification from the Department of Buildings as to where the property and building lines are located.” Is the phrase meant to apply only to the certification, or to all three alternatives? The use of “either” before the three options also is wrong and confusing as a result.

Writing simple, declarative sentences will minimize grammatical mistakes too. The spelling and grammar check tools in most word processing software are very useful, although they are not substitutes for human proofreading. Everyone has accidentally accepted the wrong substitute word when running the “spell check” function, sometimes to hilarious effect. The Internet contains several helpful grammar tools. I recommend bookmarking them on your Web browser.

Another useful device contained in most word processing software is some form of readability tool, usually a combination of the *Flesch-Kincaid Grade Level* and *Reading Ease* tests. These functions can be helpful, but they should not be relied on too heavily, as they use formulas based on the numbers of words, syllables, and sentences in a document, which can produce surprising and inexplicable results.¹⁶ I ran the two versions of the sentence from the conflicts of interest guide quoted above through the readability function in my word processing software.¹⁷ As originally written, the sentence “for the most part, conflicts, under this law, are financial or political in nature” received a readability score of 59.6 (100 being the best) and a reading level equivalent of grade 8.4. However, rewritten as “most conflicts under this law are financial or political,” the sentence received a readability score of 49.5 and a reading level equivalent of grade 9, despite having five fewer words and six fewer syllables.

16. For an extensive discussion of these tools, see William H. DuBay, *The Principles of Readability* (Aug. 25, 2004) <http://www.impact-information.com/impactinfo/readability02.pdf>.

17. See *supra*, note 15.

Electronic word processing also can assist in conforming to the last plain language rule: maximize readability through document design. Experts in visual perception have found that layout, font style, and font size can affect the reader's ability to understand written material, although there is not universal agreement as to what fonts are best for any given purpose.¹⁸ Generally, however, using a font size of eleven points or more improves readability.¹⁹

Another aspect of visual impact to remember is that the spacing of letters and words in the document affects readability. A font, such as Times New Roman, that spaces letters differently depending on the letter, makes individual words easier to distinguish from the adjacent ones. Justifying text to the right margin of a document makes the text harder to read because it alters the spacing of letters and words in each line to make them end at the right margin.

Blank space in a document further helps readers follow the text. To increase blank space, keep paragraphs short with one idea in each. Another effective way to incorporate blank space is to use bullet points. A list embedded in the text and separated only by commas can be hard to follow. Presenting required items or steps as separate bulleted items makes it less likely that the reader will miss one.

18. See McCormick, *supra* note 16; see also Laura Hughes and Arnold Wilkins, *Large Print and Reading Independence* (2000), <http://www.galeschools.com/pdf/BenefitsofLargePrint.pdf>; see also Rebecca Woods, Kristi Davis and Lauren F. V Scharff, *Effects of Typeface and Font Size Legibility*, AM. J. PSYCHOL. RES. (2005), <http://www.mcneese.edu/ajpr/vol1/ajpr9.pdf>.

19. Note that an eleven font size varies depending on the font style.

An excellent example of what not to do when it comes to plain language is the “Privacy Notice” required under the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). Anyone who has visited a doctor in the last ten years has been given this document and asked to sign a statement confirming that they read it, although I suspect few did. The Privacy Notice usually has several pages explaining a patient’s right to keep health information confidential and then lists several circumstances under which the health care provider will release a patient’s medical information. A version that I received recently listed twenty-two exceptions in no apparent order. In the middle of the list of exceptions was: “We will disclose health information about you when required to do so by federal, state or local law.” Moreover, the twenty-two exceptions appeared BEFORE the explanation of my privacy rights. The next time you are sitting in a doctor’s waiting room, instead of reading six-month old issues of *Newsweek*, read the HIPAA notice handed to you and try to spot all the plain language errors.

“Plain language” is an essential tool for making the government accessible to the public. This is especially true in communities with large immigrant populations whose familiarity with English may be limited. Fortunately, it is easier than ever to prepare “plain language” materials. Electronic word processing helps government workers write documents faster and makes it easy to adjust the appearance and layout of the document without expensive printing facilities. Spelling, grammar, and readability tools included with word processing software further aid in getting to “plain language.” Finally, the Internet offers many easy-to-use writing aids. Public distrust of government diminishes as government becomes more transparent. When communicating with the public using “plain language” goes a long way in achieving that transparency.

The following online additional resources may be useful:

1. www.plainlanguage.gov (an excellent source for plain language writing aids)
2. www.plainlanguage.gov/howto/wordsuggestions/simplewords.cfm (an alphabetical list of plain language substitutes for pretentious words and phrases)
3. www.dictionary.com; www.thesaurus.com;
www.dictionary.law.com (dictionaries and thesaurus)

4. [http://grammar.ccc.commnet.edu/grammar](http://grammar.ccc.commnet.edu/grammar;);
www.wsu.edu/~brians/errors (grammar)
5. <http://wordcount.info/hw/smog.jsp> (readability)

