

A decorative pattern of various colored cells (blue, green, yellow) with nuclei, overlaid with a grid of thin grey lines, set against a light green background.

3rd edition

Clarity for Lawyers

EFFECTIVE LEGAL LANGUAGE

Mark Adler and Daphne Perry



The Law Society

Clarity for Lawyers

THIRD EDITION

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Clarity for Lawyers

Effective legal language

THIRD EDITION

Mark Adler and Daphne Perry



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Foreword

The first edition of this book was published in 1990, and it reflected what was then a relatively new development, namely a move away from unnecessarily obscure, complex and technical language in legal documents – what is pejoratively known as ‘legalese’. It is perhaps worth briefly considering why legalese developed in the first place and why it is only in the past 30 years or so that there has been a concerted effort to try and make lawyers speak and write more simply and clearly.

Nine hundred years ago, the law was written and conducted mostly in Latin and Anglo-Norman (a mixture of Old English and French with a smattering of other languages). This was partly because the law was based on Roman, Ecclesiastical and Norman principles. It was also partly due to the fact that Anglo-Norman (or French) was the language of the educated and noble classes, and Latin was used in religious circles, which is where many of those involved in the law came from. English started to replace Anglo-Norman and French in normal discourse in the 13th century, but Latin still hangs on in there. And occasionally the law even clings on to Anglo-Norman – thus, ‘La Reyne (or le Roy) le vault’ is how the monarch’s assent to a statute is recorded in Parliament even in the 21st century.

I do not think it was merely tradition which drove the retention of Latin and Norman French. In a common law system, where judges decide much of the law, so that lawyers and judges habitually refer to what was said in earlier judgments and legal arguments, it was presumably convenient to stick to the language in which those judgments and arguments were expressed. However, there was, I strongly suspect, an additional factor, namely the desire of lawyers to ensure that their expertise seemed even greater and that the law was more unattainable to the average person than it really was. The desire to make one’s profession or calling seem as mysterious and complex as possible was by no means limited to the legal profession, or indeed to the professions: the number of guilds whose expertise was thought to involve a ‘mystery’ can be seen even today in the full names of many of the City of London Livery Companies.

FOREWORD

By the beginning of the 16th century, legal documents and discourse (including judgments) were routinely being written and conducted in English. However, as lawyers began to argue cases and draft documents in English, the legacy of using foreign languages and the legacy of maintaining mystery both served to ensure that lawyers maintained an unnecessary degree of strangeness and complexity in their language. Strangeness includes idiosyncratic writing, unusual words and foreign expressions; complexity includes complicated sentences, circumlocution and inordinate length. That has tended to continue and it remains the position to the present day.

The interests of lawyers in preserving the mystique of their calling is no doubt part of the explanation for the current complex state of much legal language. But there are other explanations. Lawyers and judges must always try to be as precise in what they say as they can be, so legal language will inevitably sacrifice elegance for clarity. Nuance and implication may be the hallmark of many good writers, but lawyers should generally avoid them. Further, certain expressions will have a clear and established meaning in the law, often as a result of judges' decisions, but also as a matter of accepted convention among those practising in the relevant field. So, however poor or inapt the language of the expression may be, a cautious lawyer may well include it in a document or submission because he or she knows how it will be understood. Lawyers, like most people, tend to suffer from the belief that 'more is better', and natural caution, a hallmark of a good lawyer, carries with it a tendency to cross every 't' and dot every 'i'. All this has resulted in many documents, legal submissions and judgments being too long. The introduction of IT has tended to reinforce this problem because previous documents of the same sort (e.g. an earlier lease) can easily be used as a template for a document which a lawyer is drafting. And there is no doubt that the advent of IT has added to the length of documents.

So, why is this changing now? I suspect that it is due to a number of factors, which are probably connected. First, since the 1960s there has been a general falling away in what has been called the 'respect agenda'. Those who previously expected, and normally got, respect because of their position in society, have been finding over the past 50 years that much of the respect is gradually being stripped away. This can be seen as having both advantages and disadvantages, but for present purposes, the important thing is that the effect of this development is a greater tendency to challenge accepted norms in many areas of life. And that includes questioning the need for legalese. Secondly, there has been the growth, some might say the explosion, of the consumer society. The focus on the consumer rather than on the supplier in the legal world has meant that clients and others are more ready to expect, sometimes to demand, that documents are written in language that they can understand. Lawyers are now writing as much for clients as for each other.

FOREWORD

Thirdly, there has been a very significant increase in the number of people in the legal profession, just as in many other more privileged occupations. Although social mobility remains a very serious problem in this country, this inevitably means that there are many more lawyers who come from non-professional backgrounds, many more lawyers who were the first generation of their families to have gone to university. I suspect that this has led to a greater preparedness to challenge norms, conventions and habits which would have been accepted without question in previous generations. Finally, the internet has taken away much of the mystique associated with many aspects of life. Medical practitioners, like lawyers, are often surprised by the expert and up-to-date information that patients or clients have acquired simply by searching through specialist websites.

None of this should obscure the fact that the reduction or, even better, the removal of legalese from legal documents and legal discussion is to be welcomed. It is appropriate that the reason for this is simple and can be expressed in one sentence: it should be less hard to draft, as well as easier to understand, a document or an oral statement, if it is expressed in language which is as ordinary and simple as possible. I say 'less hard' rather than 'easier', because composing documents or legal arguments well is a real art, and even to the good and experienced drafter it is never easy.

In all these circumstances, a book on clear drafting for lawyers is to be welcomed, and a good book on the topic is to be greatly welcomed. Mark Adler and Daphne Perry have written a good book on the topic, and it is a pleasure to write this foreword to the third edition. The book is engagingly written and well structured. Many parts of the book can be read almost as much for pleasure as for instruction, as they can be regarded as a collection of anecdotes or cautionary tales. That is because the authors very sensibly realise that by far the best way to make their point is by way of examples. Finally, I would venture to suggest that anyone who is engaged in communication, whether in writing or by word of mouth, could profit from reading this book.

David Neuberger

President of the Supreme Court of the United Kingdom

August 2017



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Introduction

Who is this book for?

Primarily for lawyers and law-makers in England and Wales, from judges and legislators to paralegals and law students.

The earlier editions were welcomed overseas, particularly in common law jurisdictions and even by those using English as a second language. We have continued to write with those readers in mind.

It's also for anyone who writes in, works with, or is interested in legal language. To help non-lawyers, some of the technicalities are explained at www.clarityforlawyers.com, and we'll add to the list on request.

What is it for?

To help lawyers work more effectively and more efficiently, for their own benefit and for that of anyone affected by their work – which is all of us.

To make the law more transparent, so that its benefits and obligations are not lost in a tangle of verbiage.

We have tried to make it more interesting and readable than just a style guide, and we hope that it will sometimes surprise you.

What's new in this edition?

We have added new chapters suggesting a practical approach for those who want to start improving their writing at once (Chapter 8, 'How to start'); outlining what software can do to help improve clarity (Chapter 21, 'Computer aids'); suggesting easy, achievable ways to get user feedback on documents (Chapter 22, 'Testing documents'); and outlining a workshop for teaching lawyers to write more clearly (Appendix A, 'A legal writing workshop'). Parts B ('What is good writing?') and D ('How misunderstandings arise') are also mostly new.

INTRODUCTION

Much that is true of good writing is also relevant to speech, though we have not always spelled this out. But this edition does include more material specifically about speech.

You can find more information about the book at www.clarityforlawyers.com. We intend to add reviews; a forum for discussion, questions, and corrections; and updates.

Mark Adler (MA): As I retired in 2007, a few months after the second edition was published, I was in no position to update it. This was frustrating, because I had used some of my new leisure to read and think about aspects of legal language that I hadn't considered before, and to some extent my views had changed. Daphne resolved the problem by agreeing that we should do the job together. Apart from updating the law and practice, she has contributed much from her own experience and has brought a fresh eye to the text.

Daphne Perry (DP): I was delighted to have a chance to contribute to my favourite textbook and to publish more widely some of the ideas I have developed, first in practice as a commercial litigator and advocate and later in my consultancy, writing, and training work. It is my ambition to make the world a better place by encouraging lawyers to write so that their readers can understand them first time. I hope this book, and my contribution to it, will continue to advance that aim.

Why does it look the way it does?

Ideally, every aspect of its format would reflect the book's recommendations. In reality, there are commercial constraints, particularly as we wanted to keep the price down. Some aspects have not been settled as we write this but we are grateful to Law Society Publishing for their flexibility and for the trouble they are taking to adapt their house style to accommodate us.

Footnotes can be intrusive and annoying, especially when they are merely citations which many readers will not look at, and when citations are mixed up with incidental comments. Where such notes are unavoidable, they have been tidied away as endnotes after each chapter. Comprehensive lists of case citations and publication references are included at the end of the book (see 'Index of cases' and 'Bibliography' respectively).

Part A

What's wrong with legal writing?

Chapter 1

What's wrong with traditional legal writing?

Introduction

Lawyers with keyboards or dictating machines forget they are people; however amiable and unpretentious they are at other times, when they compose the written word a strange personality emerges. Where a human being would say

The house is ready

a solicitor employs a large staff to say

We hereby give you notice in accordance with clause 11 of the Contract dated 6th November 2016 the made between Miranda Homes Limited of 157 Bracknell Road South Farnham Hampshire (1) and East Hill Residents Association Limited of 157 Bracknell Road, South Farnham, Hampshire SF4 5GR (2) and James Edward Brownlow & Katherine Elizabeth Brownlow of 81 Landfall Road South Farnham Hampshire (3) that the above property is now constructionally complete.

What persuades solicitors that all this is necessary? The belief that careful drafting will avoid ambiguity? There would have been none; with the address given (as usual) in the heading of the letter, the four-word alternative could not have been misunderstood by the solicitor-recipient. But a more helpful writer could have added:

You should therefore arrange to complete the purchase by 1st September[, please].

What is wrong with the longer form?

- *Hereby* adds nothing. Could the recipients have argued that *We give you notice ...* did not constitute notice?
- *We give you notice that* is similarly redundant.
- *In accordance with* is wordy; *under* would be neater.
- Nothing is gained by reciting the contract, since it had already been identified by the reference to the house in the heading of the letter.

PART A: WHAT'S WRONG WITH LEGAL WRITING?

- So keen was the writer to reproduce the entire contents of the dictionary that he (or she) did not notice the mistaken use of *the* instead of *and* in the second line. This error turns the supposedly precise text into gibberish.
- *Dated 6th November 2016 and made ...* could be expressed more economically: *dated 6 November 2016 ...*
- *Contract* is a common noun, not a proper one, and does not deserve a capital letter.
- If the names of the parties must be spelled out, the usual *Ltd* would serve.
- Commas are omitted from the first incidence of the Bracknell Road address. This creates ambiguity: is it *157 Bracknell Road, South Farnham* or *157 Bracknell Road South, Farnham*? And if there is a good reason for abandoning punctuation (and the postcode), why are they both restored on the following line?
- The postcode (which the recipient would have checked before exchange of contracts) is no help here.
- The repetition of the address is clumsy and gives the impression that the writer was not aware that it had already been given: *of the same address* could replace the second recital; or (with slight rearrangement) the first could be omitted in favour of *both of ...*
- The use of the numbers (1) and (2) might be appropriate if it is not otherwise clear who is who (though it always should be – see, for example, the revision on p.86), but it is an affectation in a letter.
- The use of *and* between each of three items in a list is clumsy.
- On the third reference to South Farnham (where both solicitors had their offices) the writer is still assuring the recipient that it is in Hampshire.
- *The above ...* is no more precise than *the ...*; there is no property mentioned below.
- *Constructionally complete* is not a term of art and has no clear meaning. We suspect that it was a slip, perhaps copied from the contract, and that the writer meant practical completion.

Few people read more legal writing than they have to, especially if it's badly written. So it's worth bearing in mind Armstrong and Terrell's warning (2015):

Our starting point has been a painful psychological fact about how readers, especially readers who are habitually skeptical, approach a document. At every level, from its very beginning all the way down into the innards of its paragraphs, they are constantly asking annoying questions: Why am I reading this? Where are we going? Why are we going there?

But even if the reader perseveres, and is able to unravel the language, the message itself may well be flawed. Justice Samuel Alito of the US Supreme Court thinks that (Garner, 2011):

WHAT'S WRONG WITH TRADITIONAL LEGAL WRITING?

there is a clear relationship between good, clear writing and good, clear thinking. And if you don't have one, it's very hard to have the other.

Throughout this book we suggest clearer, more concise, and, we hope, more effective alternatives to pieces of traditional drafting. You might find that we – like everyone else – make mistakes. But that does not mean it is wrong to write more clearly; any error can (and is more likely to) be corrected within the guidelines we are proposing. If you spot one, or have any other criticism, please post it on the book's website at www.clarityforlawyers.com.

So what is wrong with traditional legal writing? In summary:

- It wastes everyone's time.
- It wastes everyone's money.
- It reduces lawyers' earnings.
- It holds up commerce and people's lives.
- It is imprecise.
- It causes unnecessary and sometimes expensive mistakes.
- It often fails to achieve the writer's purpose.
- It alienates clients, their advisers, and the public.
- It alienates many judges.
- It sounds archaic.
- It shuts people out of their own business.
- It undermines the rule of law.
- It is often itself unlawful.
- It can be unprofessional.
- It is inhuman.
- And it's as dull as lead (and almost as indigestible).

If you are convinced, you might want to go straight to Part C where we start to discuss the writing habits that can make legal writing more effective. Or, for argument and examples in support of the bulleted assertions and an explanation of what we are trying to do, please read straight on.

Legalese wastes time

Legalese takes longer to read. This is partly because there is more of it, but there are other reasons; several factors make it more time-consuming, word for word. These are the:

- unbroken layout;
- long and convoluted sentences;
- more difficult words; and
- absence of punctuation.

PART A: WHAT'S WRONG WITH LEGAL WRITING?

Take this example from a commercial lease, written by a committee of lawyers who had no homes to go to:

Not to use or permit or suffer to be used the demised premises or any part thereof or any buildings or erections at any time hereafter erected thereon or on any part thereof as and for all or any of the purposes of a brewery or a club (whether proprietary or members) or a public house or other licensed premises or otherwise for the preparation manufacture supply distribution or sale whether wholesale or retail and whether for consumption on or off the premises of all or any alcoholic liquors of any description and not without the previous consent in writing of the Landlord to carry on or permit upon the demised premises any trade business or occupation other than that of a retail shop for the sale of X.

They could have said just:

Not to make or sell alcoholic drinks in the shop or (without the landlord's written consent) to use it except for the retail sale of X.

(We explain the omission of *not to use or permit* on p.106.) The irony is that the drafters must have started with something like the shorter version in mind. What did the client want? That the premises be used as a shop, with the landlord having a reasonable say in what was sold – but on no account strong drink. Why then did the drafters so painstakingly construct that elaborate waffle? The tenant's solicitor would only have to decode it. So, also, would the parties and their advisers each time a query arose over the years and whenever the lease was sold or mortgaged.

The late Dr Robert Eagleson, an Australian linguist and legal drafting consultant, once said (in correspondence) that he hadn't managed to devise a suitable test

... but from experience I think it is pretty certain that legalese takes longer to write.

Public servants ('civil servants' in the UK) often begin with a plain version and then redraft into a longer version meaning the same.

Lawyers tend to do the same. No one begins with a grammatically correct 300-word sentence. They begin with many short ones and then merge. To get everything in the right order takes time.

Getting all the right content in the right order takes not only time but experience, skill, thought, and care. An efficient shortcut is to copy what the writer (or someone else) has written before. Using a precedent also reduces the risk of overlooking what others have already considered, although it introduces other, less obvious, risks. Unfortunately, most precedents are still in traditional style, but when it's time to add or update a precedent, a clearer style will be a lasting asset.

Research reported by the Law Reform Commission of Victoria (1987, para.106) shows that plain English (a concept we discuss in Chapter 4)

WHAT'S WRONG WITH TRADITIONAL LEGAL WRITING?

increases the speed with which lawyers read documents and solve problems interpreting legislation. Those findings have since been duplicated, notably by Martin Cutts' research reported in *Lucid Law* (2000).

DP: In 2014, I ran a timed trial on a two-page letter asking a court manager to preserve documents for an appeal. A small group of postgraduate legal writing students read the letter and answered questions testing their understanding. The students given the original version took about 30 per cent longer to finish answering than those looking at the version rewritten according to the principles in this book. The students looking at the rewritten version also gave more accurate answers. This was not an isolated example; I often run less precisely measured tests on shorter documents, and routinely find a noticeable difference in reading time.

The reader of a traditional text has a harder task than the writer, who (ideally) knows the intended meaning.

The 158-word original sentence below took Mark Adler some four minutes to read and understand, a rate of about 40 words a minute. The 54-word plainer version that follows it omitted unnecessary and some irrational detail and should take about 20 seconds, a rate of 165 words a minute. What slowed him down so much in the original? He had to:

- Force himself to read to the end, dragging his mind back to the text when it wandered.
- Concentrate hard on what he was reading.
- Search for cross-references and skim them for their gist.
- Break the text down into its parts, so that he could put subordinate clauses to one side as he worked out the structure of the whole and extracted the essence of the meaning.
- Read each part more than once.
- Reassure himself that he correctly understood it (though a thorough check would have taken much longer).

Original (158 words)

If at any time when the aggregate of the Initial Percentage and any Portioned Percentage (as hereinafter defined) acquired by the Leaseholder pursuant to the provisions of Clause 2 and the Fourth Schedule hereto is less than 100 % there has been a disposal of the Lease otherwise than in the circumstances detailed in Clause 3(15)(b) hereof and the Landlord by notice in writing served upon the Leaseholder within two months after receipt of notice of the disposal pursuant to Clause 3(16) hereof so requires the Leaseholder shall pay to the Landlord on demand the Market Value of the Relevant Percentage as defined in and ascertained in accordance with the provisions of the Fourth Schedule hereto as if the Leaseholder had served upon the Landlord on the date of the disposal a notice pursuant to Paragraph 2(1) of the Fourth Schedule hereto stating his intention to acquire such Portioned Percentage as would thereafter reduce the Relevant Percentage to nil

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Revision (54 words)

The tenant must buy the landlord's remaining share of the lease, using the valuation machinery in clause x and paying the price on demand, if:

- (1) The ownership of the lease changes in breach of clause 3(15)(b); and
- (2) Within two months of receiving notice of the change, the landlord gives the tenant notice to buy.

That example was taken from a document 20 pages long, with about 360 words to a page. Scaling up from the extract, it would take about three hours to read in full, though in practice the sanity breaks will extend that time. Then it must be explained to the client, ideally in writing – another long and tedious job. If the revision reduces the 7,200 words of the original pro rata to 2,500 words, it should take about 15 minutes to read, and leave only points of law to explain to clients (who can read the document for themselves).

Any change in writing habits takes time – whether to simplify a legalistic style or to complicate a simple one (as some writers do on joining the profession). So, at least in the short term, writing clearly saves more time for the reader than it does for the writer. But in Chapter 8 and Appendix A we suggest a practical approach for busy professionals to improve their style without disrupting their workflow. Meanwhile, lawyers should demand, and help develop, clear and simple precedents. They might begin by focusing on those 'high stakes' documents which will most benefit the clients, the firm, and the writer. Improvements might make extra work in the short term for users familiar with the old version, but will guard against the dangers of skimming.

In the longer term, it will become quicker to write the initial draft. Any time saved can be reallocated to think more about what readers will need and to check and improve the draft.

Legalese wastes money

Just as time is wasted, so is money.

Lawyers spending 12 times as many hours as should be necessary on a job are likely to charge up to 12 times as much as they might; more if they think the complexity justifies a higher rate. To give some idea of the burden this imposes on all but the wealthiest clients, a solicitor charging 'only' £225 an hour – and some charge much more – will save a client earning £25,000 a year about two working days' income for every hour's work no longer necessary. Cutting the time taken to carry out the work can make the lawyer's services more affordable for the client and profitable for the lawyer. Even on work charged at an hourly rate, there is commercial pressure to keep fees in proportion to the value of the transaction and unbillable hours may have to be written off. Lawyers working for a fixed fee must reduce their profit or quote more to allow for wasted time. Moreover,

WHAT'S WRONG WITH TRADITIONAL LEGAL WRITING?

our experience has been that clearly written documents attract fewer amendments and so reduce both the cost of negotiations and the delay to the clients' business while they are conducted.

Time and money are also wasted in dealing with queries about unclear text, and in correcting errors arising from it. For example, the UK Parliament's Public Accounts Committee reported that (UK PAC, 2010):

Feedback from advisors had revealed that a letter [HM Revenue and Customs] sends out each year to people joining Income Tax Self Assessment was confusing. By changing the letter it had eliminated 88,000 calls which would save the Department £447,000 a year.

And in 2015, HM Courts & Tribunals Service was receiving 500,000 applications a year to reduce court fees and rejecting up to 70 per cent, even though most applicants did qualify, because the applicants had misunderstood the form or sent the wrong evidence. Faulty applications dropped once it simplified the application process, changed the form, and reduced the guidance from 37 pages to 12, improving the outcome for applicants and saving work for court staff.¹

For many more examples, see *Writing for Dollars, Writing to Please* (Kimble, 2012).



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Mark Adler and Daphne Perry

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