

Clarity

Number 51

May 2004

Journal of the
international movement
to simplify legal language

Editor in chief:
Michèle Asprey

Guest editor for this issue:
David Elliott

In this issue

How to contact Clarity	2
Writing advice and challenges	
The Rt. Hon. B McLachlin <i>Legal writing: some tools</i>	5
J Keyes <i>The democratic challenge to drafting readable laws</i>	3
A Sims Q.C. <i>WGAS ... advice from the Deep South</i>	27
Securities laws: the ugly, the good	
D MacDonald <i>Disclosure overload: lawyers are the problem, not the solution</i>	12
D Hyndman <i>Plain language means better regulation</i>	14
Plain language initiatives, testing, and benefits	
R Grotzky <i>Plain language: its effects on organizational performance</i>	17
S Stableford, P Studwell & J Minkowitz <i>Know your rights: a plain language series illuminates legal issues for seniors</i>	19
D Huron <i>Testing plain language texts with adult learners</i>	24
Sex, sewers, and drafting pointers	
J Aitken <i>Tudor drafting</i>	28
D Elliott <i>The Orians, the Andians and the Andorians</i>	10
D Elliott <i>Provided—and the Kingdom of If</i>	30
Obituary: Professor JE Adams	26
Clarity and general news	
Conferences	32
Letters to the editor	35
From the President	36
Membership matters	39
How to join Clarity	40

Patrons The Rt Hon Sir Christopher Staughton and Justice Michael Kirby

Committee

President: Professor Joseph Kimble (kimblej@cooley.edu)

Members: Country Representatives *plus* Simon Adamyk, Mark Adler, Michèle Asprey, Peter Butt, Sir Edward Caldwell, Robert Eagleson, Robert Lowe, John Pare, John Walton, Richard Woof.

The international movement to simplify legal language

www.clarity-international.net

Clarity ... the journal

Published in May and November

President

Professor Joseph Kimble
kimblej@cooley.edu

Editor in chief

Michèle Asprey
PO Box 379 Milsons Point
NSW Australia 1565
Fax: 61 2 9252 0189
mmasprey@ozemail.com.au

Guest editors for next issue

Dr Jacquie Harrison
jharrison@unitec.ac.nz

Dr Nittaya Campbell
nittaya@mngt.waikato.ac.nz

c/o Dr Jacquie Harrison
Head of School
School of Communication
Unitec New Zealand
Private Bag 92025
Auckland, New Zealand
Phone: 64 9 815 2917
Fax: 64 9 815 4330

Advertising rates

Full page: £150
Smaller area: pro rata
Minimum charge: £20
Contact Joe Kimble
kimblej@cooley.edu

Copyright policy

Authors retain copyright in their articles.

Anyone wanting to reproduce an article in whole or in part should first obtain the permission of the author, and should acknowledge *Clarity* as the source of the original.

2 *Clarity* 51 (May 2004)

Country Representatives

Australia: Christopher Balmford
Words and Beyond Pty Ltd
1 Barrack St, Sydney NSW 2000
02 8235 2337 (fax 9290 2280)
christopher.balmford@cleardocs.com

Brazil: Dominic Charles Minett
Lex English Language Services Ltda
Av Luiz Carlos Berrini 1461, 3rd Floor
Vila Olympia
Sao Paulo, SP 04571-903
011 5077 2508 (phone & fax)
dominic@lexenglish.com.br

Canada: Philip Knight
1074 Fulton Avenue
W. Vancouver, BC V7T 1N2
604 925 9041 (fax 925 0912)
philknight2@telus.net

France: Anne Wagner
Département Droit
Université du Littoral Côte d'Opale
21, rue Saint-Louis, BP 774
62327 Boulogne sur Mer Cédex
03 21 99 41 22 (fax 21 99 41 57)
valwagnerfr@yahoo.com

Hong Kong: Wai-chung Suen
Department of Justice
9/F Queensway Govt Offices
66 Queensway, Admiralty
2867 4171 (fax 2845 2215)
wcsuen@doj.gov.hk

India: Sandeep Dave
4 Kanch, Plot No. 191, 11th Road
West of Khar, Mumbai 400052
22 2600 0550
sandeepdave@hotmail.com

Israel: Myla Kaplan
POB 56357, 34987 Haifa
972 52 379811 (fax 48 110020)
mylakaplan@yahoo.com

Italy: Alfredo Fioritto
Dipartimento Funzione Pubblica
Progetto Chiaro
Via del Sudario, 49, Rome
06 6899 7226 (fax 6899 7078)
chiaro@funzionepubblica.it

Japan: Kyal Hill
1-50-4 Takinogawa
Kita-ku, Tokyo 114-0023
080 3415 2082 (fax 03 3910 8895)
kyal.hill@mhmjapan.com

Malaysia: Juprin Wong-Adamal
State Attorney-General's Chambers, 8th Floor
Menara Tun Mustapha
88990 Kota Kinabalu, Sabah
88 440 736 (fax 439 604)
Juprin.Adamal@sabah.gov.my

New Zealand: Richard Castle
148A Tinakori Road
Thorndon, Wellington 6002
04 938 0711 (fax 934 0712)
schloss@paradise.net.nz

Singapore: Prof Hwee-Ying Yeo
Law Faculty
National Univ. of Singapore
Kent Ridge 119260
772 3639 (fax 779 0979)
lawyeohy@nus.edu.sg

South Africa: Prof Frans Viljoen
Law Faculty, Univ. of Pretoria
Pretoria, 0002
012 420 2374 (fax 362 5125)
fviljoen@hakuna.up.ac.za

Sweden: Barbro Ehrenberg-Sundin
Justitiedepartementet
SE-103 33 Stockholm
08 405 48 23 (fax 20 27 34)
barbro.ehrenberg-sundin@justice.ministry.se

Thailand: Frank G Anderson
745/1 Seubsiri Road Soi 3/3 (Taptim)
Muang, Nakhonratchasima 30000
44 274972 (phone & fax)
ethics@loxinfo.co.th

UK: Paul Clark
Cripps Harries Hall
Wallside House
12 Mt Ephraim Road
Tunbridge Wells
Kent TN1 1EG
01892 515121 (fax 01892 544878)
pec@crippslaw.com

USA: Prof Joseph Kimble
Thomas Cooley Law School
PO Box 13038
Lansing, Michigan 48901-3038
1 517 371 5140 (fax 334 5781)
kimblej@cooley.edu

Other European countries:
Catherine Rawson
c/- Av Charles Gillisquet 17
1030 Brussels, Belgium
32 2 736 8032 (fax 248 2132)
legal_easy@hotmail.com

All other countries:
Please contact the USA representative

This issue

Clarity No 51 moves from sex and sewers in the reign of King Henry VIII to a tenacious sect known as the *Andorians* and, in between, picks up tools for legal writing from the Chief Justice of the Supreme Court of Canada, scathing criticism about securities disclosure requirements, and good news on the securities front from British Columbia.

And all this within the overall framework of this issue: *how writers can help readers*, reflected in articles about a new initiative to inform seniors of their legal rights, the benefits to business of using plain language, testing texts, and sage advice from the US Deep South *WGAS*. But first, a thoughtful piece on drafting legislation in a democracy ...

Thank you to all contributors, a deepened sense of appreciation to Mark Adler for editing *Clarity* on his own for so many years, and thanks for the support and advice on this issue from editor in chief, Michèle Asprey.

David Elliott
Guest editor
words@davidelliott.ca

Prestigious award to Clarity member

The Swedish Academy has given *Clarity* member and country representative Barbro Ehrenberg-Sundin an award for her “eminent services to Swedish linguistic research and plain language work”. The award recognizes the fine groundbreaking work in which Barbro has been involved for the past 25 years for the Swedish Justice ministry and a wide variety of Swedish government authorities. The prize, awarded annually since 1953, is valued at 50,000 Sw. crowns (\$US7,000). All *Clarity* members will delight in Barbro’s receiving this award from the Swedish Academy. Our warmest congratulations, Barbro!

The democratic challenge to drafting readable laws

John Mark Keyes

*Director, Legislative Policy and Development,
Justice Canada*

Drafting laws is a specialized form of writing. Although much has been done to demystify it and make laws more accessible, legislative drafting retains many aspects that set it apart from other forms of writing. Some of these aspects present communication challenges. In this article, I look at one of them: the democratic imperative to allow people to participate in making the laws that will govern them.

In countries with democratic traditions, many people have their fingers in the legislative pie. Laws most often begin with widely shared impulses to do something about a social situation. These impulses coalesce around some desirable change in behaviour. Groups of people develop rules to accomplish this change and the rules are ultimately transformed into law through processes designed to allow public input and ensure accountability.

Although elected politicians usually have the last word on what text becomes law, they generally rely on a host of advisers. They also consider the views of members of the public, often expressed by particular interest groups, associations or lobbyists. This helps explain why I have used the word *drafting* in the title to this article. It suggests a form of writing that involves not only the expression of ideas, but also their development. Robert Dick has aptly described it as “legal thinking made visible” (*Legal Drafting in Plain Language*, Carswell, Toronto: 1995 at p 5). Drafting allows groups of people to look at their ideas, discuss them, make changes and elaborate them in greater detail. It is essential to developing a common understanding of how things are supposed to be.

Much guidance on good writing takes as a given the content to be expressed and suggests how it can be best communicated to readers. It assumes that the writer has control over the content, or at any rate knows what it is. Legislative drafting tests this assumption.

There is no single author of a law, or at least none in the conventional sense. Those who talk about laws (particularly when they find fault in them) habitually speak of the “drafter” or the law-maker’s “intention”, but these are largely devices for personifying an authorship that transcends a particular person and instead resides in some amorphous group behaviour.

To be sure, the British parliamentary model has traditionally included a role for people called drafters who have rather more control over legislative texts than others. And drafting laws may perhaps have been at one time a somewhat solitary task conforming to the paradigm of a single author. But the world of the solitary drafter, to the extent that it ever really existed, was also a place where legislative drafting and enactment were remote from most of the community. Drafting was entrusted to individuals who, like their colleagues in other branches of the legal profession, simply did what they judged necessary to give their clients peace of mind with a piece of paper. It went hand in hand with the notion that law had its own language, known only to the sacred few who practised the legal profession, and that it operated in a world apart.

This world is no longer with us. Although drafters still have a place in the legislative process, their lot is utterly unlike that of the solitary fellow I just described. It has been transformed by modern concerns about “transparency” in law-making. These concerns relate both to the processes that bring laws into being as well as to how well laws communicate once they are in place. More and more people want to get “in on the Act”. Legislative drafting today has as much to do with mediating differences among them as it has with expressing ideas. Just as more people want to read legislative texts, so too more people have an opinion about how these texts should be worded.

Expanded participation in legislative drafting poses a number of challenges. Many of those involved in law-making are concerned with ensuring that their particular interests are advanced or protected. They also bring assumptions, if not convictions, about what words are needed to protect these interests. Legislative drafting can become a giant game of scrabble in which the participants put forward their words

in the hope of translating them into the biggest gains. In the midst of this, the overall clarity and intelligibility of the text tend to suffer.

Broadened participation in law-making challenges the role of the drafter. Debates about policy and wording fuse. Political deal-making often ends up in last-minute drafting changes made with little if any chance to consider how well the eventual policy (whatever it may be) has been expressed. In fact, obscure drafting or “fuzzy language” may even be desired by those who are anxious to make a deal and move on. There are, after all, courts to sort things out later.

Faced with these developments, many of us who work in professional drafting offices try to achieve readability in a text that must also satisfy political and legal demands. We have, I believe, a good sense of what makes it easier to read the text of a law (note, for example, the Legislative Drafting Conventions of the Uniform Law Conference of Canada: <http://www.ulcc.ca/en/us/index.cfm?sec=5>). However, what we find equally challenging is how to do this when confronted with a host of contrary voices. Is there anything we can do to salvage some regard for the communicative dimension of law-making when faced with these challenges?

I suggest that the place to start is in convincing those who are involved in drafting that the readability of the text is vital. This may also entail convincing them that not all draft texts are created equal, that some are easier to read than others and that there are in fact standards to assess readability.

The second step involves a return of sorts to the world where people placed their confidence in a drafter to accomplish in words what they intend in their thoughts. The problem with wide participation in drafting is that not everyone, indeed, I would suggest relatively few people, have the kind of understanding of written language needed to express the law in a readable form. In the past, the drafter’s role was sold on the basis that the writing was law and law by its nature required specialized language. There is still some truth to this, but knowledge of the legal system is no longer enough for drafters. Today, they must sell their talents on an additional basis: that special expertise is needed to

achieve a text that a large community of readers will understand when reading it over a period of time.

I am not altogether optimistic that this selling job can be done. In fact, I have some misgivings about recognizing experts and leaving everything to them. So a perhaps more palatable, if not more realistic, alternative is to develop not only the writing skills of drafters, but also their skills in explaining or indeed advocating their drafting suggestions. This fits nicely with my first point about getting people to recognize that there is such a thing as drafting quality measured in terms of how effectively people use a text to obtain the information they need. Manuals and guides that explain how legislative texts can be made more readable are essential, not only to explain what can be done, but also for generating discussion about what works best. Good examples of these are the Plain English Manual and Drafting Directions of the Australian Office of Parliamentary Counsel (see <http://www.opc.gov.au/about/documents.htm>) and the New Zealand Legislative Advisory Committee Guidelines (<http://www.justice.govt.nz/lac/index.html>).

My final suggestion is a kind of decampment from the field of legislative battle. If it is impossible to achieve the kind of buy-in I am suggesting by those who are involved in law-making, then perhaps there is scope to clean up once the dust has settled. This is the approach of revision or codification, which tends to take place in quieter, more rational places than under the political glare of the moment. Notable projects of this nature are the UK Inland Revenue Tax Law Rewrite (<http://www.inlandrevenue.gov.uk/rewrite/index.htm>), and the Canadian Explosives Regulations Project (http://www.nrcan.gc.ca/mms/explosif/over/plmain_e.htm).

© JM Keyes
jkeyes@justice.gc.ca

John Mark Keyes has been a legislative drafter with the Canadian Government since 1983. He also teaches as an adjunct professor at the Faculty of Law, University of Ottawa and has written Executive Legislation: Delegated Law-making by the Executive (Butterworths: 1992). The views expressed in this article are his own personally and do not necessarily represent those of Justice Canada.

Legal writing: some tools

The Right Honourable Beverley McLachlin P.C.
Chief Justice of the Supreme Court of Canada

This article is a selection of remarks from a speech given by the Chief Justice at the annual Alberta Law Review Banquet, 2001.

Reprinted with permission of the Alberta Law Review. The full article was published in the Alberta Law Review (2001) 39 Alta. L. Rev. 695.

... I would like to talk to you about the ... skill of legal writing. I begin with a preliminary question: Does legal writing still matter in the electronic age? The answer, it seems to me, is an unequivocal yes.

... we cannot rely on communications technology to ensure the quality of communication. In fact, speed often has the opposite effect. Amidst all these technological advances, clear, concise, and organized legal writing remains the foundation of good advocacy. Technology cannot ensure that the language is clear, concisely phrased or logically organized, although it can sometimes be harnessed to help. Effective legal writing remains essential, whether we are writing to clients, preparing articles for law reviews or organizing documents for appeal courts. Emerson once said that it is a luxury to be understood. For lawyers, it goes beyond that. Being understood is a necessity. So yes, good legal writing *does* matter. Lawyers, legal scholars, and judges work through words. Words are our tools. We should use them effectively. It does not serve the courts, the public or the profession to persist with language that only lawyers can understand.

This answer leads us to a second question: Do lawyers and judges use words well? Here my answer must be more equivocal. Sadly, our reputation is far from shining. Too often our critics accuse us of wallowing in arcane language. They say—to use a phrase worthy of lawyers—that we cherish obfuscation. They refer to convoluted language as the secret handshake of the profession, going on to point out that the legal profession is not supposed to be a secret society.

Mavor Moore, the respected Canadian playwright and producer, once gently—but with more than a grain of truth—chided lawyers for intentionally perpetuating such foggy language:

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.¹

Of course, many lawyers write well. Yet too little time too often forces us to pay too little attention to good legal writing. We see our profession as legal, not editorial. Yet we could not be more wrong. Well-written briefs are critical to effective advocacy and well-written judgments essential to the application and development of the law. Plain English, logically organized and clearly expressed, will make your argument far better and any judgment more useful.

Appellate judges see an almost endless supply of legal writing in the factums before them. The quality of that writing varies greatly. Sometimes it is clear, concise, and forceful. Too often it is muddled, convoluted and tentative, peppered with “hereinafter,” “generally,” “subject to,” and similar jargon that gets in the way of communication. Although judges try to address the merits of a case, not the writing skills of counsel, poor writing can prevent judges from grasping the legal subtleties that counsel is trying to express.

If lawyers often fail to write well, the same is true of judges. Judges are aware as never before about the importance of clear, concise judgments that offer succinct guidance on legal principle. For years now, Canadian judges have been attending courses on judgment writing. We began by tapping the American interest in the special challenges of judgment writing, and now we have our own experts in the field. Yet too often the complexity of the subject matter and the law, coupled with the pressures of time, overwhelm the judges’ good intentions to write clearly, simply, and concisely.

So, sadly, the answer to the question “Do lawyers and judges write well?” is still too often “No.” As a critic once stated, “[t]here are two things wrong with almost all legal writing. One is its style. The other is its content.”² While the phrase brings a chuckle, it still rings all too true.

This brings us to a third question: How can we improve our legal writing? We can start by reminding ourselves continually of the need to master the elementary, but oft neglected, rules of good legal writing. Before you reach the Supreme Court—or any other court or forum where you apply your advocacy skills—remind yourself that the basic rules of good writing are as essential an element of your skills as the power of your intellect and the force of your legal reasoning.

The widely respected and highly readable British current affairs magazine, *The Economist*, reminds us in its *Pocket Style Book* that, “Clear thinking is, in fact, the key to clear writing.”³ Writing is not simply the random recording of thoughts. Writing cannot be clear without mental organization. Equally, trying to rid a text of its redundancies, verbosity and excruciating structure will often expose the confusion of an argument. Writing clearly, and rewriting, offers you a chance to rethink your strategy before it falters in court. Sometimes lawyers know how to write but resort to unclear writing to hide muddy thinking. They will eventually be found out. Better to rethink the strategy and rephrase the writing than to enter court hoping the judges will not detect that your murky writing is a smokescreen for a poor argument.

George Orwell observed that a scrupulous writer will ask at least four questions in writing every sentence: “What am I trying to say? What words will express it? What image or idiom will make it clearer? Is this image fresh enough to have an effect?” And, said Orwell, the writer will probably ask two more: “Could I put it more shortly? Have I said anything that is avoidably ugly?”⁴

In his essay, *Politics and the English Language* (1946), Orwell proposed six elementary rules of writing:

- (i) Never use a metaphor, simile or other figure of speech which you are used to seeing in print.
- (ii) Never use a long word where a short word will do.
- (iii) If it is possible to cut out a word, always cut it out.

- (iv) Never use the passive where you can use the active.
- (v) Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.

[Let this in particular be a reminder to those lawyers who still spout Latin when English will do just as well].

- (vi) Break any of these rules sooner than saying anything outright barbarous.⁵

Yet lawyers often ignore these basic rules. Their—shall I say our—prose is notorious for these cardinal sins. The first—and perhaps the worst—cardinal sin is verbosity. The good artisan knows which tool to use for which task. But we lawyers, the craftsmen of words, like to use every instrument in the toolbox. In *Plain English for Lawyers*, American lawyer Richard Wydick argues that we often use many words to say what could be said in a few:

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, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is “(1) wordy, (2) unclear, (3) pompous, and (4) dull.”⁶

A lot of the wordiness that mars legal writing is related to the use of what Wydick calls “arcane phrases.” Some lawyers might feel less than whole if they cannot dress their writing in words and phrases that have traditionally provided so much comfort for the profession, and so much confusion for everyone else. But “hereinafter,” “subsequent to,” “utilize,” “*inter alia*,” “until such times as,” and “notwithstanding the fact that” will not win the hearts or minds of the judiciary. These phrases may make you sound like a lawyer to an unformed public, although they will do little to inform the public. They certainly will not impress a court.

Redundant legal phrases get in the way of communication. “Cease and desist,” “due and payable,” and “good and sufficient” are examples. Then comes the much abused expression “null and void.” Wydick asks:

Why do lawyers use the term *null and void*? According to the dictionary, either *null* or *void* by itself would do the job. But the lawyer’s pen seems impelled to write *null and void*, as though driven by primordial instinct. An occasional lawyer, perhaps believing that *null and void* looks naked by itself, will write *totally null and void*, or perhaps *totally null and void and of no further force or effect whatsoever*.⁷

Maybe lawyers who write like this still believe they are being paid by the word.

If using too many words takes first prize in the pantheon of legal writing sins, stringing them together in dull ways runs a close second. Lawyers love the passive voice. They think it gives objectivity to their statements. But taking the action out of writing does not add to its power. Quite the reverse. Lawyers should avoid the passive voice, and not only because Orwell disliked it. The passive voice saps text of its strength and hides too much. It continues to puzzle our critics that a profession that struggles for precision indulges so shamelessly in passive sentences. For example, the statement that “it was found that he lied” hides the identity of the person who decided. Why not be direct and informative?

Third prize in the catalogue of legal writing sins goes to nominalization. Justice John Laskin of the Ontario Court of Appeal criticizes the lawyer’s penchant for changing verbs into nouns,⁸ and he is right. Action verbs bring prose to life, make it leap off the page. When you reduce the action to a thing, it just lies there, flat and unremarkable. Laskin goes so far as to call this a contagious disease among lawyers. So watch your nominalizations. “Instead of writing ‘make an argument,’ write ‘argue,’ instead of ‘executed a veto,’ write ‘vetoed.’”⁹

...

“Well, sin is interesting,” I hear you saying, “but what about the positive? What are the good practices that legal writing should follow?” Again, Justice Laskin assists. In a recent article, he offers instructions on the form and content of factums.¹⁰ Clear writing remains the foundation for any successful factum, he advises, and offers the following rules of advocacy. They apply just as well to writing learned papers or judgments.

The first rule of advocacy—the cardinal rule, according to Justice Laskin—is to put yourself in the position of your audience; in the case of a *factum*, the judges. They know nothing of the case. You are intimately familiar with it. What must you tell them to get a favourable outcome on appeal?

Judges too must try to put themselves in the position of their audience. Their task is more complicated than counsel's since they must write for many audiences:

- the parties
- the lawyers
- other judges
- academics
- the press and the public.

Plain, clear language is the only way to meet the goal of communicating with all these audiences.

Another tip Justice Laskin offers is “point-first writing.”¹¹ Point-first writing puts context before details. It is a valuable tool for advocates. Set out the context in the *factum* before the details. Describe the context in an overview statement. This helps the court understand the case and provides a framework around which the judges can organize the details. Without context, judges are left to decide the importance of details without knowing their relevance. This does not help counsel's case.

And remember your sentence structure. Long sentences filled with subordinate clauses produce headaches, but little else. In their haste to qualify their statements with such clauses, too many lawyers bury the main idea. Sentences beginning with dependent clauses such as “although,” “if” or “even if” will tire readers before they get to the main clause. Put dependent clauses at the end of the sentence, not the beginning. Make important points at the beginning or end of the sentence, not in the middle. And don't be afraid to use a list to make a *factum* more readable.

Length matters too. Do not assume that judges will be critical of a short *factum*. Court rules may establish the maximum length of a *factum*. Too many lawyers interpret this upper limit as their target. Instead, they should say what they need to say. When they have said it, they should

stop. The same, need I say, applies to judgments—although too often we judges forget it. And legal articles? Is not conciseness a virtue there too?

I do not argue that we should pay such deference to the rules of writing that they become a straightjacket of grammatically correct but colourless language. Effective legal writing must move beyond simply communicating ideas. It must also *convince*. Good legal style can be summed up in three words: communication that convinces. It is important to state the facts, law and theory of the case clearly and concisely. But it is equally important to attract the judge to one's thesis—to convince and persuade. So heed Orwell's advice and search for the striking figure of speech. Remember Lord Sankey's metaphor in the *Persons Case* for the Canadian Constitution: “a living tree capable of growth and expansion.”¹² How economical. How memorable. How enduring.

There is no shortcut to effective writing. Practice will make it easier, but good legal writing is simply hard work. One day, as you prepare a particularly troublesome *factum*, you will undoubtedly agree with Orwell when he described writing a book as a “horrible, exhausting struggle, like a long bout of some painful illness.”¹³ I don't want to discourage you—Orwell was a bit of a pessimist, after all—but his point about the demands of writing is well taken.

And the work, of course, doesn't end with the writing. All writing requires editing. All editing takes time. You may need to edit several times, looking each time at a different characteristic—accurate case citations, typing errors, grammar, punctuation, tone, headings or sentence length. I frequently go through three or four complete redrafts of reasons for judgment; reorganizing, shortening. Sometimes I abandon a first draft altogether, consigning it to my special high-security waste basket.

At this point, I must digress to make a personal attack on the-time-is-money-assembly-line thinking that has moved from the factory floor—where it belongs—to the legal desk, where it does not. Legal writers must be prepared to throw the product of hours—indeed

days—into the waste basket. They must be prepared to abandon paths they have started down. They must fight the notion that the bad draft is time wasted. It is not. Legal analysis is an act of exploration. As such, it involves false starts and restarts. Do not be afraid to throw away what you have done and begin again.

And here's the bonus. Good legal writing makes lawyers good oral advocates. When you take the written word and adapt it for your oral presentation, you will find yourself using the same philosophy as in your writing. You will be simple, direct, brief, and convincing. Your aim will be to communicate—to make it as easy as possible for the court to understand you.

...

Justice Brennan of the United States Supreme Court liked to tell the story of his first criminal trial. He had been appointed to defend a vehicular manslaughter case. An elderly Irish police officer who lived near the defendant agreed to be a character witness. Unfortunately, the young Brennan did not know that he was allowed to prepare a witness to testify. Mr. Brennan's examination of the officer went as follows:

"Sir, are you acquainted with the defendant's reputation for veracity in the vicinage where he resides?"

The officer looked puzzled. Still, he wanted to help. "Well, he is a good driver, I'd say", he volunteered tentatively.

Shaken but undeterred, Brennan repeated his question word for word. This time, the witness simply stared at him. As Brennan began the third time, the judge interrupted.

"Officer, do you know the young man over there?" pointing to the defendant.

"Yes. Your Honor."

"Have you ever known him to lie?"

"Why, no, Your Honor."

"Well, that is what Mr. Brennan has been asking you, but he went to Harvard Law School and has forgotten how to speak English."¹⁴

Some of you here tonight may have been to Harvard Law School, and I would never malign that august institution. Let me say only this. I hope that the clear skies and straight talk of Alberta will encourage you always to avoid pedantic obfuscation and cherish clear communication.

- 1 M. Moore, "The Lawyer" in *And What Do You Do?: A Short Guide to the Trades and Professions* (London: Dent, 1960) 49 at 49.
- 2 F. Rodell, "Goodbye to Law Reviews" (1936) 23 *Va. L. Rev.* 38 at 38.
- 3 *The Economist Pocket Style Book* (London: Economist Publications, 1986) at xi.
- 4 G. Orwell, "Politics and the English Language" in *Collected Essays* (London: Secker & Warburg, 1961) 353 at 362.
- 5 *Ibid.* at 366-67
- 6 R. Wydick, *Plain English For Lawyers*, 4th ed. (Durham: Carolina Academic Press, 1998) at 3.
- 7 *Ibid.* at 19 [emphasis in original].
- 8 J.I. Laskin, J.A., "Forget the Wind Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums" (August 1999) 18 *Advocates' Soc. J.* 3 at 10.
- 9 *Ibid.*
- 10 *Supra* note 8 at 3-12.
- 11 *Supra* note 8 at 4.
- 12 *Edwards v. Canada (A.G.)*, [1930] A.C. 124 at 136 (P.C.), rev'g *Reference as to the meaning of the word "persons" in section 24 of the British North America Act, 1867*, [1928] S.C.R. 276.
- 13 G. Orwell, "Why I Write" in *Collected Essays* (London: Secker & Warburg, 1961) 435 at 442.
- 14 "28 Matters That Writers Ought to Be Appraised Of" in R. LeFlar, ed., *Appellate Judicial Opinions* (St. Paul, Minn.: West Publishing, 1974) 194 at 195-95, reproduced in R.J. Aldisert, *Opinion Writing* (St. Paul: West Publishing, 1990) at 230-31.

It is reinforcing to hear the advice given by Clarity members advocated by senior members of the judiciary. Ed.

The *Orians*, the *Andians*, and the *Andorians*

David Elliott

Guest Editor, *Clarity* No 51

Peter Butt's drafting note in *Clarity* 50, p. 40 about the use of *and* and *or*, made me wonder if the drafter really had "used a pair of words where one would have done" (*Victims Compensation Fund v Brown* (2002) 54 NSWLR 668). Is "symptoms and disability" an example of a composite phrase? Had the drafter really used two words where one would have done? I'm sceptical, but Peter's advice—be careful with *and* and *or*—led me to revisit sometimes challenging questions.

The questions

Are you an *Orian* or an *Andian*? Or are you an *Andorian*? Have you ever been puzzled, or challenged, about your use of *or*, of *and*, or even of *and/or*?

Tools for analysis

Garth Thornton, in *Legislative Drafting*, Butterworths, (4th) p 96-97 gives 2 illustrations of the challenges of *and* and of *or* summarized as follows:

Illustration 1: A and B may do X.

This could mean:

- (i) A and B jointly may do X.
- (ii) A may do X, B may do X, or both A and B may do X.
- (iii) The single concept of A and B may do X (for example, if A=civil servant and B=doctor then a doctor who is a civil servant may do X).

Now, a change of one word for the second illustration.

Illustration 2: A or B may do X.

This could mean:

- (i) Either A or B, but not both of them, may do X.
- (ii) A may do X, B may do X or both A and B may do X.

Notice that, of the possible interpretations, there is overlap in the 2nd interpretive possibility in illustration 1 and in the 2nd interpretation of illustration 2. As Thornton says:

Very often the context admits of no possible ambiguity, but such a possibility must always be kept in mind. Once recognized, it is never difficult to remove it.

The key, then, is to recognize the potential ambiguity. This can be easier said than done. It's easy to skip over *ands* and *ors* in the heat of a drafting moment.

The question with *or* is whether it is used:

- to indicate that once a choice of an alternative is made the other alternative or alternatives are no longer available, or
- to indicate that a choice of one alternative does not exclude making other choices from any one or more of the other alternatives.

Reed Dickerson explained it this way:

It is not always clear whether the writer intends the **inclusive** *or* (A or B or both) or the **exclusive** *or* (A or B but not both).

As for *and*, and modifying Reed Dickerson's explanation a touch, he said:

... it is not always clear whether the writer intends the **individual** *and* (A and B jointly and individually) or the **joint** *and* (A and B jointly, but not individually).

Taking Reed Dickerson's explanation of the ambiguity as a tool to help in drafting, the question to ask is:

every time *or* and every time *and* is used

- Do I intend to use the **inclusive** *or* or the **exclusive** *or*?
- Do I intend to use the **joint and individual** *and* or the **joint but not individual** *and*?

Judicial analysis of *and* and *or*

Typical judicial analysis of *and* and *or* is this kind of statement—this one from Canada, in *Clergue v. Vivian & Co* (1909), 41 S.C.R. 607 at 617

In order to give effect to the intention of the parties ... the word *or* should be here read as *and*

Sometimes the court holds the opposite—that *and* must be read as *or*.

It is often not clear from the judicial analysis whether the court is resolving an ambiguity or whether it is correcting what it

sees as a mistake. The distinction is important because as Professor Ruth Sullivan points out in the 4th edition of *Sullivan and Driedger on the Construction of Statutes*, p 69:

The distinction between resolving ambiguity and correcting a drafter's mistake is worth making because the latter calls for much stronger evidence of legislative intent ... a drafter's mistake can be corrected only if the court knows for sure what the legislature intended, but failed, to say.

There is another potential problem if a court declares "a mistake" in a definition. While a court may appropriately find in one context that the **inclusive** or **exclusive** *or* was used, or the **individual** *and* or the **joint and individual** *and* it is unlikely that the court will go on to review every other use of the definition to see if the court's interpretation can be properly applied throughout the legislation. If the court declares that in a particular context the **inclusive** or **exclusive** *or* was used, no damage is done to the rest of the Act, unless that declaration is made about a definition. If a court declares an error and amends a definition, then the court effectively amends not just the definition, but every section in which the definition is used.

The Andorians

There is a tenacious sect—the *Andorians*—who use *and/or*, presumably in an attempt to cover all the bases without having to think about any of them. *And/or* is reputed to have emerged in the mid-19 century in mercantile contracts. Now it crops up in the most surprising

legal places: wills, contracts, insurance policies, legislation.

In 1965 Lord Reid said: The symbol *and/or* is not yet part of the English language.

I was surprised to find it in the Merriam-Webster Dictionary. There it is defined as

conj (1853)—used as a function word to indicate that two words or expressions are to be taken together or individually <language comprehension and/or production—David Crystal.

With some relief I could not find it in any Oxford Dictionary—and then I stopped looking, except in law dictionaries, where it is always critically reviewed.

I was shocked to find this in *Fowler's Modern English Usage* (2nd)

and/or. The ugly device of writing *x and/or y* to save the trouble of writing *x or y or both of them* is common and convenient in some kinds of official, legal, and business documents, but should not be allowed outside them.

Surely the *but*, and what follows, is a misprint.

The third edition of *Fowler's*, by Burchfield, is less prescriptive and more descriptive:

and/or. A formula denoting that items joined by it can be taken either together or as alternatives. First recorded in the mid-19C. in legal contexts, and still employed from time to time in legal documents, *and/or* verges on the inelegant when used in general writing: *The Press has rather plumped for the scholar as writer, and/or as biblio-*

phile—*Cambridge Rev.*, 1959; *political signalling by such means can be dangerous and/or ambiguous*—*Bull. Amer. Acad. Arts & Sci.*, 1987. The more comfortable way of expressing the same idea is to use *X or Y or both*, or in many contexts, just *or*.

Higher court judges seem to rather enjoy the venting opportunity *and/or* gives them:

Pigeon J. former Justice of the Supreme Court of Canada:

And/or seems to be used by writers whose main concern is to appear erudite. In my opinion, quite the opposite impression is created. Use of this conjunction which is not a conjunction is repugnant to the spirit of the language, English or French.

Viscount Simonds in the House of Lords: a "bastard conjunction".

The Wisconsin Supreme Court: a befuddling, nameless thing, that Janus-faced verbal monstrosity ...

The Australian High Court: common and deplorable.

From a Texas Appeal Court: an "abominable invention ... devoid of meaning and incapable of classification ...".

A New York Court said that the expression will be given a meaning "as will best accord with the equity of the situation".

Every text on legal drafting I have read says the same thing: **don't use *and/or***.

© D Elliott
words@davidelliott.ca

David Elliott has a practice that is confined to legislative drafting on contract and acting as an arbitrator in labour relations and sports related disputes.

Disclosure overload: lawyers are the problem, not the solution

Duncan MacDonald

Former General Counsel, Citigroup Inc.'s Europe and North America card business

Reprinted with permission from American Banker, January 23, 2004.

Editor's note: In this article, the word "feds" refers to regulatory agencies that oversee the financial services industry in the US, such as the Federal Reserve Board and the Securities and Exchange Commission. The word "disclosure" refers to laws that require banks to provide notices to consumers of certain rights (for example, how to correct billing errors, calculate interest charges, protest discrimination, protect privacy, and so on).

The efforts of seven regulators to introduce uniform, conspicuous plain-language standards for consumer financial disclosures are doomed to failure. The reason is simple: The lawyers are in charge.

The feds' goal is to amend a slew of regulations (Z, B, E, etc.) with input from anybody with an interest. They have asked for comments by Jan. 31, 2004.

Lawyers, of course, will dominate the process, perhaps in excess of 1,000 of them from the feds' staffs and those who will comment. And that raises a few questions:

Is it sensible to believe that a discordant chorus of 1,000 members of the bar can advance the cause of disclosure clarity?

Aren't lawyers authors of the mess the feds want to undo?

Isn't the real problem disclosure overload?

Let's look at some more numbers. Thirty years ago the documentation for basic loans, cards, and auto financing could fit on one or two pages, and mortgages could close with fewer than 10 pages in most places. Today the basics cover up to 20 pages and mortgages upward of 150.

Without radical pruning, in 10 years these numbers probably will double or triple, even with plain language. Is this consumer protection?

I have been an advocate of plain language since my days in law school in the 1960s. In the mid-'70s I wrote the first banking agreement in plain language and the first plain-language law in the

United States. My efforts, I am sorry to say, had little impact in making consumer agreements easier to read.

Plain and simple, government suffocated the plain-language movement. Its lawyers did it over several decades by imposing on banks layer upon layer of complex, obtuse, and often contradictory disclosures.

Their domination of retail bank documents is so complete that almost nothing of consequence is left for business lawyers to put into plain language.

Government has made things so bad that it is hard to imagine its latest effort can change the status quo, even minimally. It is clear from the notices the feds published in the Federal Register that they do not intend to attack the actual problem, disclosure overload.

If the feds really want to help consumers shop for financial services, they should approach the task from a totally different perspective.

They should talk to experts who know about consumer shopping and reading habits. They should ask:

What is the percentage of consumers who shop comparing fed disclosures? (My guess: a thin fraction of 1%.)

Which kinds of disclosure best capture the attention of consumers?

Is it simplicity that does the trick, or something else?

Who in the private and public sectors produce the best disclosures?

Are the documents the feds' would like consumers to compare available?

What does disclosure glut cost consumers and banks in paperwork, attorney usage, time, dispute resolution, and the like?

These and other questions will lead the regulators to what everybody else already knows—that their top-heavy disclosure regime has failed completely. Not only does it ensure that consumers will never read bank documents, it forces excessive dependence on lawyers.

To break that dependence so that real reform can happen, the feds must take bold action.

For starters, they should put nonlawyers in charge of the cleanup effort, set their sights exclusively on disclosure overload, and seek ideas from people who are more efficient with words than lawyers: journalists, teachers, composers, novelists, Madison Avenue, sign makers, even poets.

The unspeakable should happen: Lawyers should be kept out of the picture as long as possible.

In the meantime, the new team should note the following:

Other government agencies are good at plain language. The labelling of food, medicine, and clothing is a good example. The ingredients of a package of hot dogs, the side effects of an aspirin, and how to clean a cashmere sweater are regularly conveyed in a square inch or two. Signs we see everywhere do the same thing.

Plain language is useless without a relentless commitment to brevity. Turning 20 pages of disclosures into shorter, easier-to-read sentences that will add up to 30 pages is not what consumers need or want. Less is best.

Even in plain language, it is easier to hide bad information in a long document—one cluttered with government-required disclosures—than a short one.

Making disclosures uniformly more conspicuous is not a solution. It would be silly to believe that consumers will read a privacy statement or arbitration clause at the top of an agreement because it is in large, bold, or colored type or festooned with bullet points.

In the long run, uniformity is impossible. No matter what the feds hope to achieve through uniformity, Congress, the states, and judges will upset the plan every time a hot new issue suits their fancy.

Every new disclosure requirement diminishes prior disclosures and undermines other important provisions of contracts.

Requiring that many notices be conspicuous implies that the rest of a document is less important. That can be unfair and even unconstitutional. It can also be self-defeating; an excess of such notices, which arguably exists today, neutralizes their conspicuousness.

There is no good reason that basic loans can't fit on one page in a reasonable type size, and mortgages in not more than four. Don't let the lawyers bully you into thinking otherwise.

Disclosure overload befuddles consumers and banks every time they do business with each other. Plain-language disclosures are overdue by about 30 years.

Unfortunately, the current cleanup effort looks phony. If regulators again let lawyers dominate the process, why bother?

© D MacDonald
duncarch@optonline.net

Duncan MacDonald got his JD degree from Indiana University (Bloomington) and an LLM from New York University. In 1998 he retired from Citibank, where he had been General Counsel of Card Products for Europe and North America.

Mark Adler

a solicitor with 24 years in general practice
and a former Chairman of Clarity
will work with you to

Update your precedents into clear, modern English

Written terms of business available on request
74 South Street, Dorking, Surrey RH4 2 HD, UK
Phone +44 (0) 1306 741055 Fax 741066
adler@adler.demon.co.uk www.adler.demon.co.uk

Plain language means better regulation

Douglas M. Hyndman

*Chair, British Columbia Securities Commission,
Vancouver, British Columbia*

Financial regulators are not the first people that leap to mind when you think about plain language. We have a reputation, earned over many years, of using obtuse legal jargon and spewing out rules, guidelines and other documents that numb the minds of unfortunate souls forced to read them.

Here is a paragraph from a policy the Canadian securities regulators published in 1983.

Where the proceeds of the issue are being applied to the property being reported upon, the person making the report required to be filed with the administrator (Commission) must be free of any association with the issuer. Therefore, except where specifically provided for in the Regulations, the report shall not be written by a director, officer or employee of the issuer or of an affiliate of the issuer or who is a partner, employer or employee of such director, officer or employee or who is an associate of any director or officer of the issuer or of an affiliate of the issuer. The report shall not be submitted if the person making it or any partner or employer or associate to him beneficially owns, directly or indirectly, any securities of the issuer or of a subsidiary thereof or, if the issuer is a subsidiary, any securities of the parent issuer. This latter restriction does not apply to a person, partner, employer or associate, as the case may be, if the person, partner, employer, or associate is not empowered to decide whether securities of the issuer or the parent issuer, as the case may be, are to be beneficially owned, directly or indirectly, by him, or if he is not entitled to vote in respect thereof.

Did you get that?

At the British Columbia Securities Commission, we have been changing the way we communicate with our stakeholders. We have adopted plain language as an important part of how we do our job as the regulator of British Columbia's

capital markets. Plain language is not an end in itself but a tool to make our communication clearer and our regulation more effective.

As securities regulators, we have a difficult job—overseeing a complex financial market to protect investors and support the integrity of the market. We have a set of rules that are necessarily complex and we deal with stakeholders who have widely varying interests and levels of sophistication. We have learned that we can do our job better if we communicate effectively with these people and speak to them in language that they can understand.

Communicating with industry and professionals

A scheme of regulation can work only if most of the regulated community voluntarily complies with the rules. Legal enforcement is time consuming and expensive, so we can use it only to deal with the minority who deliberately or negligently flout the appropriate standards of market conduct. We can help the honest and diligent majority, who want to do what is right, by making our rules accessible and understandable both to people in industry and to their professional advisers.

For the past few years we have been trying, with increasing success, to write our official communications—notices and policies—in plain language. It has been remarkable to see how we have been able to cut away the dense verbiage that traditionally characterized these documents and to give industry and professionals a clear and unambiguous message.

We have also been writing more explanatory material—brochures and web pages—to explain our rules and how to comply with them. The plain language approach complements our efforts to push this material out to industry and educate members of the regulated community about their obligations.

We are now developing a new *Securities Act* and new rules, also in plain language. A major objective is to provide a system in which business people can figure out what they have to do to comply, without routinely calling in their lawyers. They will still need legal advice for difficult or complex matters, but we think compliance will be better, and regulation less burdensome, if the people in the business can

read and understand the rules and directly put their minds to what they should be doing.

We still have much to do to achieve this goal. For example, we replaced the policy containing the paragraph I quoted at the beginning of this article with a new rule that is somewhat easier to read but is still pretty complex. We also produced a brochure that explains the equivalent aspect of the rule this way:

A qualified person is not independent if:

- The qualified person is or expects to become a director, officer or employee of the issuer or an insider or affiliate of the issuer, or
- The qualified person owns or expects to receive options or other securities of the issuer or of an affiliate of the issuer, or
- The qualified person owns or expects to receive an interest in the property or in a property within two kilometres of the property, or
- The qualified person has received the majority of his or her income, in each of the three years preceding the date of the technical report, from the issuer and insiders and affiliates of the issuer.

We think this at least gives the businessperson who has to comply with the rule a fighting chance of understanding what it means.

Communicating with investors

The *raison d'être* of securities regulators is to protect investors. We do that, in large part, by giving them information, either directly in the form of warnings and educational material or indirectly by requiring industry to provide disclosure.

Most investors rely on financial advisers to help them make decisions about buying and selling securities. We have rules governing the conduct of advisers. The rules are supposed to stop advisers from taking advantage of clients by providing advice that serves the adviser's, not the client's, interest. However, the rules cannot completely protect investors—they have to protect themselves too.

The investment business and securities regulation are plagued by technical jargon that most investors find hard to understand. When faced

with investment choices that are described in unclear or complex language, many investors are afraid to demonstrate ignorance by asking for a clearer explanation. Instead, they just go along with the adviser's recommendation, even if they feel uncomfortable with it. Some unscrupulous advisers exploit this psychological reaction to cheat investors. We are using plain language to fight back.

First, we have been using plain language ourselves as a core element in our investor pamphlets and web pages and in a series of "Investigate before you invest" seminars. We want to help investors understand and avoid the major pitfalls of the securities markets. Plain language strips away the camouflage of confusion and deceit and empowers the investor with a better understanding of risk and choice.

Second, we are trying to move public companies and investment firms toward the use of plain language in disclosure to investors. Our securities law has required for decades that prospectuses for new share offerings contain "full, true and plain disclosure." Unfortunately, *plain* has been the poor cousin of *full* and *true*, and very few prospectuses could be said to meet that standard. We have not done much over the years to enforce the plain requirement. Companies and their directors have been disciplined for prospectuses that fell short of being full or true, but no one has ever faced an enforcement action for a prospectus that was not plain.

No doubt it is harder to prove that a document is not plain than that a fact is missing or a statement is false. However, now that we have begun using plain language in our own communications, we intend to push industry to do so too. We propose to include in our new legislation a requirement that all documents industry has to file with us or give to investors be written in plain language. We will then use our existing regulatory review processes to identify and seek correction of documents that fail to meet that standard.

We recognize that change will not happen overnight, but we think that we can make a difference, and help give investors documents they will find useful, by getting started and keeping the pressure on.

As the readers of *Clarity* know, a plain language culture, like Rome, cannot be built in a day. In any organization, some people jump on the bandwagon quickly and become the leaders of the plain language transformation. Others accept the concept but find that writing in plain language is more easily said than done. Some traditionalists do not like the concept at all, either because they confuse plain language writing with “dumbing down” or because they fear losing the liturgical power of technical jargon.

For a successful transformation, the leaders of an organization have to adopt plain language personally and keep pushing it as a basic value. This works best if it is part of a broader cultural transformation that places value on communication and transparency, both within the organization and with the outside world.

We are making that change at the British Columbia Securities Commission because it will help us do a better job of protecting investors and making our securities markets fair and efficient.

© DM Hyndman
inquiries@bcsc.bc.ca

The British Columbia Securities Commission is the independent government agency responsible for regulating trading in securities in the Province of British Columbia, Canada. The commission's website is at <http://www.bcsc.bc.ca>.

Having seen some of the work that the British Columbia Securities Commission is doing, I can confirm that their efforts are first-rate. Ed.

New book by Clarity past President

Peter Butt (past President of Clarity) has just co-authored a new edition of *The Elements of Drafting* (ISBN 0 455 21945 1). His co-author, JK Aitken, is a solicitor and former university lecturer from Melbourne, Australia; an article by him on Tudor drafting appears in this issue, on page 28.

This is the 10th edition of this respected Australian text on drafting, first published in 1946. In addition to the basic principles of drafting, it has chapters on areas where drafters need to be particularly careful. These include topics such as: arrangement and order; definitions; *shall*; *and* and *or*; and expressions relating to time.

The Elements of Drafting (10th ed) by JK Aitken and Peter Butt was published by Lawbook Co in March 2004. Recommended retail price (softcover): AUS\$52.

Can you resist this drafting challenge?

In each example, pick *or*, *and*, or *and/or* to fill in the gap—no redrafting—pick 1 of the 3:

- (1) a testator bequeathed “all the residue of the moneys _____ securities for money I may die possessed of”.
- (2) no person shall be convicted of an offence by reason of an act done or omitted by him while labouring under natural imbecility or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, _____ of knowing that such an act or omission was wrong.
- (3) an application for a court order to stop “issuing marriage licenses to _____ solemnizing marriages of same-sex couples in San Francisco”.

Turn to page 38 for the drafter's choice, and what the court said about it.

Plain language: its effect on organizational performance

Rose Grotsky

Plain language consultant, document designer, trainer and researcher

Leading organizations worldwide have identified plain language, internally and in the marketplace, as a strategic tool to improve organizational performance and service quality. A spokesperson for the Alliance of Manufacturers and Exporters Canada remarks:

We need to look at all areas where we can improve. Although we've been prepared to spend millions on new equipment, we've been reluctant to focus on hidden issues. We often blamed workers, instead of ensuring that they received clear and accessible information.¹

Furthermore, in recent years, organizations have begun to cost-justify their investment in plain language. They have reported economic benefits resulting from improved employee productivity and increased sales, and cost savings from fewer errors and lower support costs.

In Canada, however, primarily qualitative data and anecdotal evidence have existed to support the notion that plain language can contribute to fiscal, operational and employee goals. Few, if any, Canadian companies have measured or reported on *how* plain language can improve quality and efficiency in their business operations ... until now.

How did we respond to the need for plain language research?

With a grant from the National Literacy Secretariat of the Canadian Government, Toronto-based Praxis Adult Training and Skills Development implemented a project to systematically study the *business impact* of introducing plain language in the Canadian private sector. Working with 2 large companies in the telecommunications and financial services industries, we examined the tangible and intangible benefits that could accrue to each company by shifting to plain language for *internal* communications.

This article describes our project at the financial services company, called *BANCO*. It summarizes evidence to substantiate financial and other benefits from using plain language to communicate with employees.

What was the BANCO project about?

Our document revision project measured and evaluated the effects of using plain language for the online information system used in BANCO's contact centres. The primary users of the information system are customer representatives. These front-line employees are BANCO's primary means of interacting with customers who telephone about the company's many products and services. Customer representatives also have access to Help Desk representatives whom they frequently call for support to avoid keeping customers on hold for too long.

Although customer representatives realize that a huge amount of information is required to effectively respond to customers' needs, they often complain about an *information overload* and the limited time they have to keep up. One commented, "I get a lot of information that I can't use or really don't need to service a customer."

Implementing the project

Following an initial *buy-in* for plain language from senior management, Praxis team members evaluated BANCO's current information system and conducted a comprehensive field study of end users and their supervisors. Based on our findings we reorganized and revised 5 representative online documents. To ensure that the plain language documents met end-user requirements, customer representatives were recruited to participate in numerous rounds of prototype and document testing.

Setting up our experiment

We conducted a *comparison* usability test at one of BANCO's contact centres. The usability test used a control group design on 30 customer representatives who were randomly selected on a quota basis to match characteristics of age and years of service for customer representatives in all BANCO's contact centres. Using a method of random assignment, we divided the 30 subjects into 2 groups of 15:

1. an Original Document (OD) Group, which used the original versions of the documents; and
2. a Plain Language (PL) Group, which used the plain language versions.

Subjects had neither serviced the test products nor seen the original documents.

Conducting our experiment

During individual testing sessions, customer representatives were observed as they used their group's documents to perform representative simple and complex tasks. Performance data was collected to measure and then compare differences between groups on 4 variables:

1. duration of tasks;
2. incidence of errors;
3. number of support phone calls to the Help Desk; and
4. duration of Help Desk calls.

Furthermore, post-test surveys provided opinion data to reveal which test documents customer representatives preferred and how positive and negative they felt about the documents' features.

What did we find out?

The Plain Language (PL) Group scored better on all measures at a high level of significance. That is to say, the plain language documents had a dramatic and direct effect on PL Group subjects.

Significant quantitative outcomes

The test provided evidence that shifting to plain language for BANCO's online information system had the potential to:

- improve employee productivity by a forecasted 36.9%;
- decrease employee errors by a forecasted 77.1%;
- decrease the frequency of calls to the Help Desk by a forecasted 17.4%; and
- decrease the duration of calls to the Help Desk by a forecasted 10.5%.

In all but 3 instances results reported were statistically significant at the .05 level or better. This means that in at least 95 in 100 times or more, the results attained in the usability test would reflect real differences between the PL and OD Groups rather than being the result of chance. Furthermore, in the 3 instances, the results reported carried only a slightly greater than 1 in 20 likelihood of being due to chance.

Forecasting the return on investment

We then demonstrated that substantial financial benefits could potentially accrue to the company following the full implementation of plain language for BANCO's online information system.

As our outcomes were based on a small-scale study in a laboratory rather than a long-term analysis in the field, results were calculated for a:

⇒ *best case* scenario, which applied the actual results of the usability test; and

⇒ *worst case* scenario, which applied results that were 30% less than those attained in the usability test.

BOTTOM LINE... we forecast a potential return on investment of from \$3.5 million CDN (*worst case* scenario) to \$15.2 million CDN (*best case* scenario) over a 3-year period.

Significant qualitative outcomes

The post-test survey results were overwhelmingly for the plain language documents. Ratings revealed that the PL Group was 61.2% more satisfied with their documents than the OD Group.

Survey responses indicated that PL Group subjects preferred all aspects of their group's documents and felt that test documents improved their ability to find, understand and use information required for their jobs. Further-

more, across all survey questions the PL Group was statistically more likely to rate the plain language documents very or somewhat positively at the .05 level or better.

Comments from customer representatives in open-ended questions supported trends revealed by the quantitative findings. A Plain Language Group subject summed it up: “Very clear, easy to read.... Pleasing to the eye.... This would make it much easier to obtain information while the customer is on the line.... These documents would definitely be an asset on the job.”

Indicators of organizational change

Finally, the project’s success and positive outcomes have led to a change in organizational attitude toward plain language and a willingness from BANCO to:

- modify its current practices for creating contact centre documentation; and
- allocate resources to plain language over the long term.

© R Grotsky
rgrotsky@sympatico.ca

Rose Grotsky, a Toronto based consultant, helps organizations get to the point. She writes and designs usable information for print and online, delivers workshops in creating high-quality content, conducts diagnostic and comparison usability tests, and links workplace communications to the bottom line. Rose was the project’s coordinator and information designer.

- 1 Rose Grotsky, *Get to the Point: A Strategy for Writing Clearly at Work*, Toronto: Praxis Adult Training and Skills Development, 1998.

A singular use of “they”

For anyone looking for information about the singular use of “they”, Robert Eagleson’s article was printed in Volume 5 of *The Scribes Journal of Legal Writing*. It can also be found at <http://www.editorscanberra.org/they.htm>

Know your rights:

a plain language series illuminates legal issues for seniors

Sue Stableford

Co-Founder AHEC Health Literacy Center,
University of New England, Biddeford, Maine

Pamela Studwell

Director, Legal Access Project,
Legal Services for the Elderly, Augusta, Maine,

Jennifer Minkowitz

Managing Attorney,
Legal Services for the Elderly Hotline, Augusta,
Maine

The start of a unique legal literacy project

Edna White lived alone after her husband died. They had worked hard and paid off the house they bought when they got married, so she owned it free and clear. But, when Edna got sick and had to go into a nursing home, she didn’t have cash to pay the costs. So, she started getting MaineCare—that’s the new name for Medicaid. She heard that the State will take her house now that she’s on MaineCare. So Edna is worried she won’t be able to sell the house or pass it on to her children.

Stories are a universal way of bringing to light—illuminating—socially important issues and truths in a way that engage both mind and heart. This vignette is one of the 10 created about and for seniors, to introduce legal topics of particular relevance for them. The use of vignettes “humanizes” legal problems, allowing seniors to identify with but not be overwhelmed by them. Just like Edna, many older Maine adults fear that a serious illness will lead to the State taking their home to pay for medical care.

Seniors are confronted with numerous legal issues. Some are related to increasing needs for health care on limited financial means or to end of life care; others may involve dealing with creditors or maintaining visitation rights with grandchildren.

Since 1974, Legal Services for the Elderly (LSE), a non-profit law firm, has been helping Maine seniors understand these issues and their legal

rights. For 12 years, LSE has operated a toll-free, legal Hotline funded by the Administration on Aging. Hotline attorneys provide counsel and advice to callers on a wide range of issues. Similar services exist in about 20 other states.

As Hotline attorneys, Pamela Studwell and Jennifer Minkowitz have responded to numerous calls from seniors like Edna. Many were so paralyzed by fear and confusion that they waited until a crisis to seek help. Often, by the time they called, it was too late to resolve their legal problems. These “too late” calls motivated us to find a way to become more proactive. When Jennifer Minkowitz attended a Summer Institute on plain language, a seed was planted.¹ Sue Stableford was the trainer at that Institute.

Institute participants reviewed data from the 1992 National Adult Literacy Survey (NALS) and learned how to use a readability formula to check the reading level of printed materials.² Participants were astonished by the huge gap between the limited literacy skills of American adults and the high reading demands of their organizations’ materials.³

This knowledge enhanced and informed our awareness of clients’ struggles to identify, grasp, and discuss legal issues. Much of the legal information they needed simply wasn’t accessible. This realization was the start of what became the *Know Your Rights* project.

Seniors’ needs for accessible legal information

Most non-lawyers are not well versed in legal constructs and procedures. Many lack the conceptual framework to recognize legal problems, the vocabulary to discuss legal concerns, and knowledge about when and how to find appropriate legal help. Financial worries pose an additional barrier to consulting a lawyer. Yet, not addressing legal dilemmas can produce unfortunate to disastrous results.

Seniors are at especially high risk of getting caught in legal misadventures. To begin, their literacy skills are particularly limited. On the 1992 NALS prose assessment, 71% of American seniors (age 60+) scored in the lowest 2 levels.^{4, 5} Roughly translated, this means that almost $\frac{3}{4}$ read at about 7th/8th grade level. Most legal

information is written at levels significantly above this.⁶ NALS data also shows that document literacy skills (using forms, schedules, charts, and similar graphic representations) were even more limited, with fully 80% of seniors scoring in the lowest 2 NALS levels. Yet, reading and completing forms (required for most services, including legal services) demand skills far beyond the rudimentary.^{7, 8}

These skill limitations, exacerbated by fear and not knowing where to turn for help, were preventing many seniors from taking advantage of LSE’s free services. Jennifer Minkowitz envisioned a solution—developing engaging, age-appropriate, easy to read information that could be used to help identify, prevent, and redress legal problems. While not a panacea, such information could serve seniors, their family members, and caregivers in a pro-active, timely fashion.

Critical next steps: collaborating with the Maine Primary Care Association and securing project funding

As this project took conceptual shape, we were fortunate in forming an unusual but well-matched partnership with the Maine Primary Care Association, the umbrella organization for Maine’s Federally Qualified Health Centers. The Health Centers offered LSE access to legally underserved senior populations in rural Maine. As safe, trusted, and regularly frequented locations, they were ideal potential distribution sites for legal information. The goals of the project then became to provide senior Health Center patients with plain language legal information as well as face to face help from a volunteer senior lawyer at participating Centers.

Encouraged by their Association, most of the 24 Health Centers expressed interest in distributing accessible legal information. They were, in fact, often asked to direct patients with personal and legal problems to sources of help. The collaboration with LSE offered needed assistance.

LSE was fortunate, as well, in obtaining funding from the Administration on Aging (U.S. Department of Health and Human Services) and from the Maine Bar Foundation. With funding secured, we were able to engage a plain lan-

guage consultant, Sue Stableford, and a graphic design team to contribute their expertise to the project.

The core challenge: writing and producing effective plain language materials

With the key players on board, Pamela Studwell and Jennifer Minkowitz jumped into the waters of plain language materials development. Years of legal advocacy had informed us about which legal issues seniors considered most pressing. Based on this knowledge, we established a topic outline that our materials would address.

Early conversations with our plain language expert encouraged us to think with the end in mind—to conceptualize the entire project up front. This helped us to:

- imagine the individual topics/pieces as parts of a linked, named series;
- think visually about our final results (standardizing length and amount of information for each piece); and
- establish a standard way to engage our readers (using vignettes).

Once we had established this framework, we set to work writing initial content for our 10 prioritized topics. These became the *Know Your Rights* series. [See box]

In addition, Pamela Studwell created a companion piece, a self-addressed, postage paid legal “check-up” brochure. This introduces seniors to our services, and includes a mail-back form they can use to indicate areas of needed help—such as with health benefits, with a will, and other issues. When a form is returned to us, we initiate contact in the way preferred by the senior. We reach out, instead of putting the burden of first contact on them.

We learned quickly that while well-crafted plain language is easier to read, it’s not easier to plan, write, and design. Our first challenge for each topic was determining content. What was enough to be helpful and legally accurate but not so much that our readers would be overwhelmed?

After we wrestled content into submission, we were faced with explaining it simply and clearly. We drafted each piece, creating compan-

The 10 *Know Your Rights* Brochures

- #1: Can I get help paying the costs of long term nursing care in Maine?
- #2: Will I lose my home if I get Medicaid (MaineCare)?
- #3: Do I need a will?
- #4: Who will tell my doctor my health care choices when I’m too sick to do it?
- #5: and #6: Who will help me pay my bills if something happens to me? (#5 is Using a Power of Attorney and #6 is Using a Joint Bank Account to Manage Money)
- #7: A Legal Guide for Recently Widowed Seniors
- #8: What happens if I can’t pay my bills?
- #9: How should I handle a bad home repair deal?
- #10: Seeing Your Grandchildren: Your Visitation Rights

ion vignettes. As our plain language expert, Sue Stableford edited our drafts, helping us shape message delivery, text structure, words and sentences, and text design.⁹ Final readability of the brochures is 5th/6th grade level on the Fry readability scale, a level that assures accessibility for most Maine seniors.¹⁰

Beyond creating reading ease, each piece establishes rapport with readers. Titles are questions that we hear repeatedly from clients. Introductory vignettes are abbreviated, composite versions of common situations. Subtitles are questions seniors ask or need to ask. Legal terminology is largely absent except to name legal constructs or terms helpful for seniors to learn, such as ‘power of attorney’, ‘living will’, ‘advance directive’, and ‘estate recovery’.

A team of graphic designers worked closely with Pamela Studwell to bring the visual aspects of the project to fruition, creating reasonably low cost, attractive materials that can be generated from a color printer or copy machine. Graphic elements standardized across the series contribute to reading ease—age-appropriate cover photographs, large serif font

(ITC Century 13 for text body), good ink/paper contrast, left justification, and other well-recognized design features.^{11, 12} The final size and shape of each brochure, one American standard legal page (11 x 14 inches) folded in half like a book, is easy for less nimble fingers to hold and a manageable amount of text per page for even less able readers. The final touch was a new LSE logo as a unifying element of the overall design.

Initial reactions from project partners and target audience

As of February 2004, the initial commercial print run of each of the 10 pieces has only recently been distributed to Health Center members of the Maine Primary Care Association. Designated staff at each Center track the brochures—a necessity in a busy medical office. About half the Centers took advantage of an opportunity for special display racks, furnished at no cost with grant funds through LSE.

Initial reactions to the materials from both Center staffs and seniors have been positive. Staff have expressed relief at having information that addresses patient legal questions and directs them to LSE for more help. A preliminary client survey revealed similar positive responses.

Lessons learned and to be learned

There are still lessons to be learned from the results of this innovative and nationally unique project. Planned information gathering includes field testing of the first print run of materials, tracking brochure demand and distribution, collecting data from hotline calls and legal check-up forms returned to LSE, and inquiring into actual use of the information in the brochures.

Here are some lessons we have already learned:

- creating legal literacy among non-lawyers is a major challenge. There is pent-up need for accessible legal information, but demand is restrained by consumer fear or distrust of professionals, as well as some professional reluctance by lawyers to use plain language, although there are certainly some lawyers who communicate orally with clients in plain language and incorporate plain language into their standard legal documents. However, in

spite of the support of organizations such as the American Bar Association and Clarity, few plain language legal materials are available. The legal community is also largely unaware of the extent of limited literacy skills among adults

- lawyers will not lose credibility in the eyes of the public by writing and speaking clearly, in plain language. They may, in fact, gain credibility and public trust
- creating content-appropriate, vibrant plain language materials is not an endeavor to be underestimated. Finding the right balance between too little or too much information, between facts and feelings, between friendliness and firmness of tone, between use of legal terms and use of lay language, between design sophistication and ease of reproduction, etc. requires a team of skilled players and managerial determination
- identifying/naming certain situations as legal issues with solutions is a revelation to some seniors who have not previously had this understanding. For some, simply learning that they have decision-making power (e.g. making certain advance healthcare choices, giving a trusted friend power of attorney, canceling contracts before a home repair begins) is a gift beyond measure. They gain control and peace of mind. This is preventive legal action at its best.

Conclusion: the road ahead

While it seems as if we have done the “hard part” of our work, we may have just begun. The *Know Your Rights* series and legal check-up form will be useful and effective only to the extent that those needing the materials have access to them. While partnering with the Maine Primary Care Association accomplishes our immediate distribution goals, we intend to reach out to other senior-focused organizations to educate them about the need for legal literacy and this informational series. And, as noted above, we have yet to measure results.

The *Know Your Rights* series is available on LSE's website at: www.mainelse.org. Readers of this journal are also free to contact Pamela Studwell or Jennifer Minkowitz for copies or for more information. (Author contact information is on page 23.)

We encourage others to replicate and improve upon our efforts, increasing professional awareness of the need for plain language legal information and increasing public access to it.

© S Stableford
sstableford@une.edu
P Studwell
pstudwell@mainelse.org
J Minkowitz
jminkowitz@mainelse.org

Sue Stableford is a founding member of The Clear Language Group. The Center has a national reputation for excellence in health literacy/plain language consulting, training, and materials development. The Center is especially known for its National Summer Institute, Write It Easy to Read, now in its 13th year. The website for The Clear Language Group is www.clearlanguagegroup.com.

Pam Studwell also has a private law practice in Brunswick. In 20 years of public/private sector practice, she has, among other things, drafted legislation and consumer-friendly pamphlets on mental health patients' rights for a state agency and has written on probate issues for the Maine Bar Journal. She is also a drafting consultant for proposed laws for the American Bar Association's (voluntary) Central European and Eurasian Law Initiative.

Jennifer Minkowitz has held a variety of positions, including Hotline Attorney, during her eight years with Legal Services for the Elderly. Previously responsible for developing written client education materials and web site design and development, she is committed to making legal information more accessible to those who need it the most.

- 1 The AHEC Health Literacy Center at the University of New England in Biddeford, Maine has held a plain language Summer Institute for the past 12 years. For information, email: [sstableford@une.edu](mailto:ssableford@une.edu)
- 2 U.S. Department of Education Office of Educational Research and Improvement, *Adult Literacy in America: A First Look at the Results of the National Adult Literacy Survey*. Available online: <http://www.nces.ed.gov/naal>
- 3 This gap has been well documented in the health research literature for over 30 years. For a list of significant articles, see: Rudd RE, Moeykens BA & Colton TC (2000) "Health and literacy: A review of medical and public health literature" in J.P. Comings, B. Garner & C. Smith (Eds), *The annual review of adult learning and literacy, 2000* (pp 158-199) San Francisco: Jossey-Bass Publishers.
Additional citations and recent updates by the same lead author (R. Rudd) can be found at this website: www.hsph.harvard.edu/healthliteracy

- 4 U.S. Department of Education Office of Educational Research and Improvement, *Literacy of Older Adults in America: Results from the National Adult Literacy Survey*. Available online: <http://nces.ed.gov/pubs97/97576.pdf>
- 5 See note 2.
- 6 Medical consent forms, for example, have long been known to be unreadable by most patients. See: Meade C (1999), "Improving Understanding of the Informed Consent Process and Document" in *Seminars in Oncology Nursing*, 15(2): 124-137.
- 7 Canadian Public Health Association (1998), *Creating Plain Language Forms for Seniors*.
- 8 Communication Publications and Resources (1993) *Communication Briefings*, "How to Create Forms That Get the Job Done".
- 9 See for example, Kimble J (2003), "The elements of plain language", *Clarity* 50, 22-23.
- 10 Fry E (1977) "Fry's Readability Graph: Clarifications, Validity, and Extension to Level 17", *Journal of Reading*, December 1977, 242-252.
- 11 Schriver K (1997), *Dynamics in Document Design*, New York: Wiley Publishing, 1997.
- 12 Kostelnick C and Roberts D, *Designing Visual Language*, Needham Heights MA: Allyn and Bacon, 1998.

Department of Parliamentary Language

From the reports in the English Law Society's *Gazette* 13 May 2004 of the Solicitors Disciplinary Tribunal:

The SDT was also concerned that in the respondent's responses to enquiries made of him by the Law Society, some of his responses could have been considered to be somewhat wanting in total and complete accuracy.

Testing plain language texts with adult learners

Debra Isabel Huron

Writer and editor

People who don't read well can give writers important information about the comprehensibility of plain language documents.

In my work as a plain language writer and editor, I have tested plain language texts with the "experts"—low literacy learners. This article explains how I've carried out this kind of testing over the last 5 years.

What NOT to do

For the last decade, it's been very sexy to "focus test" everything from advertising slogans to the colour of stripes in toothpaste. The hallmarks of focus testing are: put a group of people in a room together; give them food and the promise of payment for their time; ask them lots and lots of questions.

This methodology may work for companies that want to know how consumers feel about their products, or for organizations that are trying to test whether a new image might work for them. It does not work if we want to find out how well people comprehend words on the printed page.

Here's why it doesn't work:

- reading is a solitary activity, and understanding what we read is not something that someone has an 'opinion' about
- adult learners are likely to be either extremely vocal or silent when they are together in a group
- when testing a text with a group, it's almost impossible to know whether a majority of learners understand key messages from the text
- group dynamics also make it highly unlikely for anyone to say they have NOT understood key messages from the text.

I have had only one experience of working with a group of adult learners to test comprehension of a text. It taught me all the lessons outlined in the list above. Although group testing was a disaster in terms of finding out whether the learners, as a group, understood vocabulary or key messages, it was a very valuable learning experience, because I knew I had to look for a better way to conduct testing.

Testing for comprehension

After reading Colin Wheildon's book, *Type & Layout*¹, I decided that the best way to test adult learners' comprehension of text was to:

- develop an interview that asked learners questions related to vocabulary, key messages, and problem areas in the text
- conduct the interview one-on-one and orally, either by telephone or in person.

I knew that I should avoid a written questionnaire in this kind of testing because many learners would not have the skills to fill out a questionnaire without assistance. I also wanted to avoid a written format because it seemed to me that, to the learners, it would seem too much like **a test!**

In all the testing I have been involved in, I have wanted answers to the following questions:

- did respondents understand basic terminology and vocabulary contained in the text?
- were respondents able to reply correctly to questions about key messages contained in the text?

An example from the Consumers' Association of Canada²

In the spring of 2002, I was hired to test 2 articles that had appeared in the first edition of a new magazine called *Consumer Aware*. The magazine was produced in plain language, thanks to funding from the National Literacy Secretariat. Here is an excerpt from the report on testing that I conducted with 8 English-speaking learners from Ontario. This excerpt shows you the kinds of questions and answers in an interview about an article entitled ***What kind of diapers would Mother Earth put on her children?***

A: Questions about terminology (language):

Question to learners	Responses from learners	
What is a landfill site? (a garbage dump)	Correct 75%	Incorrect 25%
What are disposable diapers made of? (wood pulp)	Correct 50%	Incorrect 50%
What are most cloth diapers made of? (cotton)	Correct 100%	Incorrect 0%

In 2 out of 3 questions, a majority of learners correctly defined key terminology from the magazine article (written at a Grade 8 level). This indicated that vocabulary in the article was accessible to the target audience.

B: Sample question on content (comprehension)³:

What do disposable diapers do when they are in a landfill site?	<p>If respondent said : take up a lot of room CORRECT 25%</p> <p>If respondent gave any other reply: INCORRECT 75%</p>
---	--

Analysis of sample comprehension replies (from the testing report by the Consumers' Association of Canada):

“The sentence in the text that contains the correct answer reads as follows: *When people are finished with them, disposable diapers become garbage that takes up a lot of space in landfill sites.*

In analyzing this sentence, it's clear that although it is not a long sentence, it contains 3 separate ideas:

- people are finished using diapers

- the diapers become garbage
- this garbage takes up a lot of space in landfill sites.

In fact, it is a very complex sentence. The information about the fact that diapers take up a lot of space in landfill sites is buried inside the idea that they must first become garbage. By using a simpler sentence construction, the idea would have been more readily served to the target audience. This is something writers/editors should keep in mind for future articles.”

Learning from testing

The above example illustrates how a poorly worded and overly complex sentence may befuddle adult learners who read the article. By taking the time to test for comprehension, writers can learn how to write more plainly for this audience.

Other benefits that come from this kind of testing include:

- learners' self-esteem grows when they are asked to comment on plain language texts (and when they are paid for doing so)
- organizations can develop links with the learner community by sponsoring plain language testing
- organizations can determine whether a text that was purportedly written in plain language meets the needs of adult learners.

Some organizations have tested text that is NOT written in plain language, so they can decide whether they ought to be crafting their message using plain language techniques. The value of this exercise lies in the

information the learners provide about problematic words and concepts in the text.

I hope that by seeing how testing can be done, more organizations will decide to do it. My experience leads me to believe that plain language writing improves when the target audience—adult learners—have a say in evaluating its effectiveness.

© DI Huron
dhuron@sympatico.ca

For the last 7 years, **Debra Isabel Huron** has worked on plain language texts and testing with Canadian government departments and voluntary sector organizations.

- 1 Wheildon, Colin, *Type & Layout – How typography and design can get your message across, or get in the way*, 1995, Strathmoor Press, Berkeley, California.
- 2 Excerpts from the report are used with permission of the Consumers' Association of Canada.
- 3 This was one of 5 questions designed to test learners' comprehension of key concepts.

Professor J E Adams 1931-2004

John Adams, property lawyer and lecturer, collapsed at the wheel of his car in Bristol, England and died of a heart attack on 27th February. As public speaker, teacher and practitioner John was both well known and highly regarded throughout the country and beyond. But it is as a forthright promoter of the movement towards plain legal writing that readers of this journal will best remember him. John's support of the principles which Clarity stands for was unswerving.

John Edward Adams was born in Bristol on 26th June 1931. He was a family man and proud to point out those parts of the local environment his grandfather had helped to shape. Throughout his life, John remained essentially a Bristolian and his distinctive voice never lost its Bristol ring. After a law degree at the University of Bristol and qualification as a solicitor, John embarked on a career as an academic and practitioner in property law. In 1977 he became precedents editor of *The Conveyancer and Property Lawyer*, arguably the leading property law journal in the common law world. In that role John steadily advanced the cause of plain English but without seeking to put his contributors in a straightjacket. His pithy comments in *The Conveyancer* were a delight to read and will remain as testimony to his influence. John was appointed to a chair at Queen Mary College, London in 1979. By that time he was already a star of the lecture circuit for practitioners. Many delegates will recall his witty and learned dialogues with Trevor Aldridge and others. He served on the land law and conveyancing committee of the Law Society of England and Wales for many years and was one of its leading lights. With Professor Roy Goode, John was the guiding hand in a series of annual residential courses on modern legal drafting run by the Centre for Commercial Law Studies during the 1980's. These courses were both dynamic and fun (though hard work) and the contribution of John and Roy to them was invaluable.

John had a forbidding manner and could seem unapproachable. He had no time for people who pretended to know more than they did, but respected those who were of a like mind. Once he was on your side, John's willingness to help was limitless. It's certainly hard to imagine life without him.

Richard Castle
schloss@paradise.net.nz

WGAS ... advice from the Deep South

Andrew CL Sims, QC
Barrister and Solicitor, Edmonton, Alberta

Canada now has a very sophisticated training program for new judges. It was not always so.

This story, told of the program's inception, says much about what one needs to know about plain language decision-writing. The story emanates from Justice William Stevenson, who rose quickly through Canada's judicial ranks to sit on the Supreme Court of Canada. When first appointed to Alberta's District Court, he volunteered to be the first participant in a new judgment-writing program which consisted primarily of a mentoring partnership with a senior American judge skilled in the art of opinion writing.

Justice Stevenson was as diligent and learned a jurist as one could wish for, and those qualities were only exceeded by his natural modesty and diffident demeanor. His recollection of his mentoring experience went something like this:

My assignment was to write up my reasons for decision in my first substantial trial. I was to then send them to my mentor, a senior state judge in the U.S. Deep South. My first case was a matrimonial case involving lots of conflicting evidence and argument. My draft, of which I was quite proud, amounted to 36 pages of analysis. I mailed it to my mentor. After not too long a delay, my draft arrived back on my desk, adorned with much red ink. There were many annotations and helpful observations. I understood and appreciated most of them, but there was one notation I couldn't understand. A red line had been drawn intermittently down the left margin of each page, covering in total perhaps two-thirds of my text, along with the initials "w.g.a.s".

Wanting to thank my mentor for his efforts, but also to inquire about this notation, I phoned the judge. After thanking him for his efforts, I posed the question—"wgas—that must be an American term we're not familiar with up here—what does it mean?". He described a brief pause, followed by the answer, delivered in a deep southern drawl: "Whaa boy—that means: *who gives a shit*".

Not a bad first lesson for a course in clarity.

© Andy Sims
andysims@simgroup.com

Andy Sims' practice includes acting as an arbitrator. He is also in considerable demand for the courses he gives for administrative tribunals on decision-writing.

And the lovely piece of advice recounted by Andy Sims reminded me (Ed) of a letter by Thomas Jefferson:

Dear Sir

I promised you that I would put into the form of a bill my plan of establishing the elementary schools, without taking a cent from the literary fund ...

I should apologise perhaps for the style of this bill. I dislike the verbose & intricate style of the modern English statutes, and in our revised code I endeavored to restore it to the simple one of the antient statutes, in such original bills as I drew in that work. I suppose the reformation has not been acceptable, as it has been little followed. you however can easily correct this bill to the taste of my brother lawyers, by making every other word a 'said' or 'aforesaid,' and saying every thing over 2. or 3. times, so as that nobody but we of the craft can untwist the diction, and find out what it means; and that too not so plainly but that we may conscientiously divide, one half on each side.

Taken from Reed Dickerson's Materials on Legal Drafting, West Publishing (1981), 256.

Early whistle-blower legislation discovered in ... Tudor drafting

Ken Aitken

Solicitor, Melbourne, Australia

[Dates are given in accordance with our present calendar and not in accordance with the pre-1751 calendar, under which the new year commenced on March 25.]

Henry VIII held his most high court of parliament from 16 January to 1 April 1542. At this time his fifth wife, Catherine Howard, at most 20 years of age, perhaps still in her teens, occupied a separate establishment after it had been brought to Henry's attention that she had had premarital affairs with three men: Henry Mannock, Francis Dereham and Thomas Culpepper.

The legislation before this parliament included a Bill of Attainder of Mistress Katherine Howard, late Queen of England, and divers other persons her complices. (Her name is also spelt Katharine and Catharine: in those days people were not obsessed with correct spelling.) The bill provided that the queen be convicted and attainted of high treason. Its language, as this extract shows, is directed more to public relations than to elegant and economical drafting:

And may it be enacted that the said Queen Katherine and Jane Lady Rochford for their said abominable and detestable treasons by them and every one of them most abominably and detestably committed and done against your Majesty and this realm shall by the authority of this present Parliament be attainted and convicted of high treason; and the said Queen Katherine and Jane Lady Rochford, and either of them, shall have and suffer pains of death....

The bill, on becoming law, made the wearisome procedure of a trial unnecessary and precluded the possibility of legal argument on the question of whether a premarital affair on the part of a woman who had become the king's wife amounted to treason.

Catherine was beheaded on February 13, 1542, two days after the bill received the royal assent.

It must have been decided that the conduct of royal women required closer regulation because another act followed. It is short. It consists of only 4 sentences. It seems worthy of the description Plain English, although a drafting consultant might disapprove of the euphemisms by which certain states of mind or physical activities are referred to.

The first of the 4 sentences is a recital of the earlier Act of Attainder:

Queen Katharine attainted of treason, for her incontinent life, and her complices; and all their lands and tenements, goods and chattels, shall be forfeit to the King.

The second sentence encourages loyal subjects to inform on their queen:

It shall be lawful for any of the King's subjects, if themselves do perfectly know, or by vehement presumption do perceive, any will act or condition of lightness of body in her that shall be the Queen of this realm, to disclose the same to the King, or some of his council; but they shall not openly blow it abroad, or whisper it, until it be divulged to the King or his council.

The third sentence extends the ambit of the capital offence of high treason:

If the King or any of his successors shall marry a woman who was before incontinent, if she conceal the same, it shall be high treason; and so it shall be in any other knowing it, and not revealing it to the King or one of his council, before the said marriage or within twenty days after.

This provision imposed a heavy responsibility and a high risk on anyone involved in finding Henry a sixth wife. However, Henry himself approached Catherine Parr, a woman of his court. She had outlived two well-born husbands. She had no children. But for the royal offer, she would probably have married the prominent courtier, Thomas Seymour. With him, she might have enjoyed the physical gratification that was unlikely to be derived from her marriage to Henry who was, by now, in bodily decline.

The final sentence concerns the conduct of royal ladies:

If the Queen, or the wife of the Prince, shall by writing, message, words, token or otherwise, move any other to have carnal knowledge with them, or any others shall move either of them to that end, then in the offender it shall be adjudged high treason.

Corresponding regulation of the conduct of royal gentlemen was apparently regarded as unnecessary. The legislation did not have any relevance to Catherine Parr. She was devout and upright. She reigned as Queen of England until Henry died 3 years later on 28th January 1547.

While it is difficult today to comprehend fully the Tudor conception of female beauty, a contemporary portrait shows that Catherine Parr was, by any standard, agreeable in appearance. Shortly after Henry died, she married Thomas Seymour whom she had forsaken to become queen. They made Sudely Castle, near the Cotswold town of Winchcombe, their home. Their daughter was born on 30th August 1548. Catherine died, a week later, of puerperal fever, at the age of 36.

Note: The extract from the Bill of Attainder is taken from J R Tanner, *Tudor Constitutional Documents*, 425. The statute quoted is taken from *The Statutes at Large*, Danby Pickering, vol V 106. It is headed "Queen Katharine and her complices attainted of high treason." In the Table of Statutes Anno 33 Hen 8 it is described as "Concerning the attainder of the late Queen Catharine and her complices." This is more accurate because, as stated, a separate and earlier act of attainder led to the queen's execution.

© K Aitken
jkaitken@bigpond.com

Ken Aitken has practised as a solicitor in Melbourne, Australia for 40 years. He and Professor Peter Butt of the University of Sydney are co-authors of the recently published 10th edition of Piesse, The Elements of Drafting.

Another celebrated enactment of Henry VIII was his Statute of Sewers. It is said to be the first example of the creation of a statutory body given wide delegated powers to legislate and to administer. It appointed Commissioners with "full power and authority to make, constitute and ordain laws ordinances and decrees, and further to do all and everything, mentioned in the said Commission . . . and the same laws and ordinances so made to reform, repeal and amend, and make new from time to time as the cases necessary shall require in that behalf". Ed.

Clarity seminars

on clear legal writing

Mark Adler uses many before-and-after examples to teach the theory and practice of clear, modern legal writing, covering style, layout, typography, and structure. One handout gives an outline of the lecture, which is interspersed with exercises and discussion; the other gives model answers to the exercises.

The seminars are held on your premises, and you may include as many delegates as you wish, including guests from outside your organisation. The normal size ranges between 6 and 25 delegates.

The full version lasts 5 hours (+ breaks). It costs £750 + travelling expenses + VAT.

But the arrangements are flexible, with shorter versions available.

Contact Mark Adler

+44 (0)1306 741055
<adler@adler.demon.co.uk>

Provided—and the Kingdom of *If* ...

David Elliott

Today, a writer

Recently I was asked to replace *if* with *provided* in a rule I was drafting. It was helpful to reach for an arbitration award I made some years ago in which I explained the difficulty caused by *provided*.

Legal language consistently abuses and misuses the proviso in its various forms: *provided*; *providing*; *provided that*; *provided always*; *provided also*; and so on. The word originated from Norman French and law Latin and was used by early English Parliaments to enact statute law through the words *It is provided*. FAR Bennion, *Statutory Interpretation*, Butterworths, 1984, 589 explains:

The enacting words of early statutes were *Purveu est* or *Provisum est*, respectively law French and Latin versions of the formula *It is provided*.

Professor Elmer Driedger traced the history of the proviso in *The Composition of Legislation, Legislative Forms and Precedents*, 2nd ed rev., Dept. of Justice, Ottawa, 93. Over the years legal language has tortured the word *provided*, and its cousins, with a variety of meanings.

Current legal dictionaries illustrate the wide range of meanings the word *provided* can have.

For example, *Black's Law Dictionary* (7th edition) says:

Provided. On the condition or understanding (that).

And a **proviso** is:

1. A limitation, condition, or stipulation upon whose compliance a legal or formal document's validity or application may depend.
2. In drafting, a provision that begins with the words *provided that* and supplies a condition, exception, or addition.

The point that *provided that* can mean more than a word introducing a condition was made by Latham CJ in the Australian case of *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at p 274-5:

generally, a proviso is a provision which is 'dependent on the main enactment' and not an 'independent enacting clause' . . . [But] a consideration of both the main and the subsidiary provisions in an enactment may show that the proviso contains matter which is really 'adding to not merely qualifying that which goes before'.

Bryan Garner sums up the problem with the various forms of the proviso in the 2nd edition of his *Dictionary of Modern Legal Usage*, page 710:

provided that. Writers on drafting have long cautioned drafters not to use provisos. In fact, the words *provided that* are a reliable signal that the draft is not going well.

The problem—recognized five centuries ago by Coke—is that the phrase means too many different things: *provided that* may create an exception, a limitation, a condition, or a mere addition. Sometimes the phrase is a functional equivalent of an adjectival phrase—e.g.: "*Provided that* an order under this section is approved, it shall be binding upon all persons concerned." [Read *An order approved under this section binds all persons concerned*.]

The advice not to use provisos because of the interpretation difficulties is addressed in virtually every text on legal drafting that considers provisos. For example:

- In 1852 George Coode, an English barrister, wrote of the use of provisos in statutes:

It is most desirable that the use of provisoes should be kept within some reasonable bounds. It is indeed a question whether there is ever a real necessity for a proviso. At present the abuse of the formula is universal. . . . Nothing has inflicted more trouble on the judges than the attempt to give a construction to provisoes.

Coode on Legislative Expression (2nd), reprinted in S. Robinson, *Drafting*, Butterworths, Sydney, 1973, 380.

- Robert Dick, Q.C. wrote:

The proviso is a relic which usually succeeds in lengthening a clause or paragraph and creating obscurity.

Legal Drafting (2nd), Carswell, Toronto, 1985, 92.

- In the latest edition of *The Elements of Drafting* (10th) Law Book Company, Sydney, 2004, 86:

A *proviso* is to be distinguished from a *provision*, which is a general term used to denote a clause or section in a document or statute. Also, *provided*, as a past participle, has an adjectival application corresponding to *provision* rather than *proviso*, and meaning *set out* or *agreed*.

The authors, JK Aitken and Peter Butt, then go on to describe how to avoid using provisos.

- Garth Thornton wrote in *Legislative Drafting* (4th) Butterworths, pp 80-81:

The case against the lawyer's proviso is overwhelming. On both historical and grammatical grounds the proviso stands condemned.... The case against the proviso is established beyond reasonable doubt by the ambiguity and uncertainty of the phrase.

- Fowler in *The King's English*, p 23, comments on *provided* in these words:

Provided is a small district in the kingdom of *if*; it can never be wrong to use *if* instead of *provided*; to write *provided* instead of *if* will generally be wrong, but now and then an improvement in precision.

This assumes, of course, that the word *provided* is used properly in the first place.

So this review helped my *provided* fans to convert to the Kingdom of *If*.

© D Elliott
words@davidelliott.ca

International Conference

5 - 9 July, 2005

Boulogne-sur-Mer (France)
Université du Littoral Côte d'Opale

Clarity and Obscurity in Legal Language

Organised under the auspices of CERCLE, équipe VolTer (Vocabulaire, Lexique et Terminologie) and of LARJ (Laboratoire de Recherches Juridiques)—Université du Littoral—Côte d'Opale in collaboration with Clarity.

Transparence et Opacité du Discours juridique

Organisé sous l'égide du CERCLE, équipe VolTer (Vocabulaire, Lexique et Terminologie) et du LARJ (Laboratoire de Recherches Juridiques)—Université du Littoral—Côte d'Opale, en collaboration avec Clarity.

Organising committee/*Comité organisateur*

Co-Chairs/*Co-présidents:*

Anne Wagner
Maître de Conférences,
spécialité: Langues et Droit
Université du Littoral—
Côte d'Opale

Professor Joseph Kimble
President and Membership
Secretary of *Clarity*
Thomas M. Cooley Law School

Members/*Membres:*

Nicole Fernbach
Jurilinguist
Juricom, Inc. et Centre
International de Lisibilité, Inc.

Edward Caldwell
Statute Law Society and
Law Commission for England
and Wales

Olivier Carton
Membre du Laboratoire de
Recherches Juridiques
Chargé d'enseignements
Université du Littoral—
Côte d'Opale

Call for papers

Legal language involves a complex mix of history, tradition, rules, and forms. It derives from factors as diverse as convention, fear of change, reliance on formbooks, habits acquired during legal training, and notions (perhaps false notions) of prestige. Very often, the resulting language is unclear and obscure not only to non-lawyers but even to the legal community itself. Can anything be done about this? Should anything be done?

This international conference will explore how the various linguistic disciplines can help us understand the nature of legal language—both oral and written—and how it might be improved and clarified. The conference will present and examine the latest research and theories, along with practical guidance on how to avoid obscurity. It will also review international efforts and projects to make legal language more understandable.

Appel à communications

Le discours juridique est à la fois un mélange d'histoire, de tradition, de règles et de formes. Ce mélange résulte de conventions, d'une crainte du changement et de l'influence de notions de prestige qui peuvent être abusives. La transcription dans la pratique juridique est également influencée par le respect des règles d'écriture et des usages acquis. Cela conduit à opacifier l'application de la règle de droit non seulement pour le profane, mais également pour la communauté juridique elle-même. Existe-t-il des solutions? Peut-on et doit-on y remédier?

Ce congrès international sera l'occasion de voir comment les différentes disciplines linguistiques peuvent éclairer la nature du discours juridique—verbal ou écrit—et de proposer des solutions afin de le rendre plus lisible. Les conférenciers présenteront les dernières recherches et théories en la matière avec des exemples pratiques pour aider à la compréhension du discours. Seront également évoqués les programmes d'application ainsi que les recherches internationales sur le sujet dont l'objectif est la simplification du discours juridique.

Main topics of the conference

Plenary sessions (English and French):

- The quest for clarity in law: historical overview. Why the complexity? How to change it and make clarity mainstream. Overcoming the obstacles to plain language.
- The clarity toolbox: best practices in legal writing and drafting. How to clarify legal texts. The influence of technology. Learning and teaching viewed by professionals in legal writing and drafting.
- Plain language in a multidisciplinary context (Law, Linguistics, Semiotics, Communications, Information Design).
- Plain language in the judicial context: speech acts in courts; court decisions and jury instructions; social equality aspects.
- Common Law and Civil law: differences in their approach to clarity?

Roundtables (English and French)

- International development of the Plain Language network.
- History of the movement towards clarity in law, its scope, theoretical aspects and practical achievements.
- Multilingual law and the search for clarity in translation and authoring.

Thèmes principaux de la conférence

Séances plénières (anglais et français):

- Pour une langue du droit simple: évolution historique. Causes de la complexité et ses remèdes. Comment surmonter les obstacles et produire des textes clairs?
- Les outils de la clarté: les meilleures pratiques en rédaction juridique. L'influence de la technologie. L'apprentissage et l'enseignement de la rédaction et de la langue juridique—aspects professionnels.
- La langue courante dans un contexte multidisciplinaire (droit, linguistique, sémiotique, communications, graphisme).
- La clarté dans la langue du prétoire: le performatif; les décisions judiciaires et directives au jury; questions d'égalité sociale.
- Droit civil et Common Law—Deux conceptions différentes de la clarté?

Tables rondes (anglais et français)

- L'expansion internationale du réseau de la lisibilité juridique.
- Historique du mouvement pour la lisibilité du droit, sa portée, ses enjeux théoriques et incidences pratiques.
- Le droit multilingue et la recherche de la clarté en traduction et en rédaction.

Conference contact details

Anne Wagner
Département Droit
Université du Littoral Côte d'Opale
21, rue Saint-Louis, BP 774
62327 Boulogne sur Mer Cédex
France
03 21 99 41 22 (fax 21 99 41 57)
valwagnerfr@yahoo.com
<http://www.univ-littoral.fr/appcoll.html>

Legislative Drafting in Perspective

September 9-10, 2004
Ottawa, Canada

The Canadian Institute for the Administration of Justice is pleased to present *Legislative Drafting in Perspective*.

Conference topics are expected to include:

- Ethics and drafting
- Moving from novice to expert: how drafters learn
- Statutory interpretation: how do judicial, political and regulatory perspectives influence drafting?

There will also be session on specific drafting issues and a drafting masterclass.

For further information contact: website address: <http://www.ciaj-icaj.ca>
fax: (514) 343-6296.

Fifth International Plain Language Conference

Fall 2005 (probably November)
Washington, DC, USA

The Plain Language Association International is pleased to announce the fifth international plain language conference in Washington, DC.

The theme for the conference is *Plain Language—Adding Up the Benefits*. The theme was chosen to invite papers focusing on the benefits—including cost savings—of plain language. While benefits are something we're all familiar with, producing tangible evidence of these benefits makes an even more convincing argument in favour of plain language.

As circumstances would have it, the conference sponsor and conference host share the acronym PLAIN. Plain Language Association International is the sponsor of the conference, and the Plain Language Action & Information Network, a volunteer group of U.S. government employees, is the host.

The conference hotel is expected to be in central Washington, near the Capitol, the Supreme Court, the National Archives, the Smithsonian Institution, and Union Station. PLAIN - US is currently planning the program, and expects to send out a call for papers soon. There will be pre-conference events, so plan on coming a day or two early. Don't miss this opportunity to visit Washington, DC!

Watch for details, including information on reduced fees for early registration.

For more conference information, please go to <http://plainlanguagenetwork.org/conferences/>, or contact Amy Bunk, Program Chair at apbunk10@aol.com

A word about PLAIN (International)

Formed in 1993, the Plain Language Association International is a growing all-volunteer nonprofit organisation of plain language advocates and professionals. Our members live around the world, including Canada, the United States, Australia, the United Kingdom, Sweden, South Africa, New Zealand and Japan. To date, PLAIN has sponsored four successful international conferences, with another planned for Fall (probably November) in Washington DC, 2005.

Our Mission:

- To promote the interests of plain language professionals
- To promote standards and practices of the plain language profession
- To promote research and development about plain language
- To provide marketing and networking services for our members
- To help people understand and use plain language principles.

Members include professionals who plan, write, design and create communications projects to better serve the needs of the public. We work as authors, communications specialists, consultants, designers, editors, managers, professors, trainers and writers in business education, government, health, law, medicine and social services.

We are proud of our professional connections with other major plain language organizations such as Clarity and PLAIN - US. Our web site <http://plainlanguagenetwork.org/> is resource-rich, and we have a free listserv. The benefits of joining PLAIN include reduced rates at conferences and your professional details listed in the membership section of our web site.

We hope to see you in Washington in Fall '05.

Susan Milne
Chair, PLAIN
Kitchener ON Canada
1 519 894 4593
susan.milne@sympatico.ca

Letters to the editor

More letters on *Clarity's* new look

Ken Bulgin, Bromley, England

Congratulations to the editors of *Clarity 49* on its content, but particularly on the layout. It may need to settle down a little—the proliferation of fonts used in the headings is arguably over-egging the pudding a bit - but there's no doubt it's the best looking, and clearest *Clarity* to date, and a great deal of effort must have gone into it.

One small gripe: what's the point of abandoning the established descriptive writing convention of expressing numbers under 100 in words and using figures thereafter? Will we be getting "cul8er" in subsequent editions? Surely we can escape the stultifying prolixity of legalese without slipping into the stunted vulgarity of textspeak?

Nick Lear, Sussex, England

Issue 50 was lovely. It was good to have the chance of another look at Joe Kimble's "elements of plain language". In issue 49, with the numerals experiment, *Clarity* was perhaps espousing one of his general points: *wherever possible, test consumer documents on a small group of typical users*. Perhaps that should have been a smaller group than the whole *Clarity* readership, but hey. My voice can be added to the others. I dislike numerals for low numbers or for starting a sentence, subject to the well known—and some valid and important but less well known—exceptions. Joe's dictum continues: ... *and improve the documents as need be*. In this case, that means quietly dropping the dictate, which I see you have already done.

In experimenting with numerals throughout, *Clarity* neatly proved two theses:

1. There is good reason for those conventions about using words instead of numerals for low numbers, especially *one* instead of *1* and especially at the beginning of a sentence. Two examples: *1 thing is sure*, and *3 examples of changes*, were enough to convince one (... convince 1?).

2. Whilst there may be merit in certain newspapers having a house style for the staff, such a style does not usually apply to outside contributors. The *Clarity Journal* does not need it to impose a uniform style on its contributors. To do so would be counterproductive. The experiment itself was to encourage diversity and debate; imposing a house style does the opposite.

I suggest if anyone likes to use numerals throughout, they need to have an additional rule constantly in mind: Don't do it if it looks silly.

Country reps wanted

If you are in a country without a country representative and you would consider taking on the job, please contact Joe Kimble at <kimblej@cooley.edu>.

Clarity back numbers

You can download recent issues from the website <www.clarity-international.net>.

Mark Adler will supply individual earlier ones on request, without charge, as pdf files, if you don't ask for too many.

Order from: Mark Adler
adler@adler.demon.co.uk

Good news!

Clarity recently received £2,778-11, its half share of the "profit" on the Cambridge 2002 conference (with apologies from the new treasurer of the Statute Law Society for the delay in transmitting the funds). A good deal of the credit for that "credit" must go to *Clarity's* UK committee member, Paul Clark. Paul put a lot of time and effort into finding a suitable venue for the conference, including canvassing a number of potential sites and doing the sums to ensure best value for money. In the end he recommended Peterhouse College in Cambridge. We're sure that all who attended will agree that it was an excellent choice.

I'm honored to be starting my term as Clarity's President. But I am daunted by having to follow Mark Adler and Peter Butt. I doubt that I can match their record of achievement.

Tributes to Mark, written by Peter, appeared in *Clarity* No. 46, p. 1, and in *Clarity* No. 50, p. 45. And at Clarity's 2001 Annual General Meeting, this resolution passed unanimously: "That Clarity award a life membership to Mark Adler—'Mr. Clarity'—for his unstinting work for many years as Chair of Clarity and proponent of plain legal language."

Now let me offer a tribute to Peter. Peter not only steered Clarity with a steady hand but also moved us forward in several important ways. With the help of Paul Clark, he arranged for our first international conference—sponsored jointly by Clarity and the Statute Law Society and held in Cambridge in the summer of 2002. Peter also prepared Clarity's first brochure and arranged for Mallesons Stephen Jaques to finance it. (Mallesons, Australia's largest law firm, has been a terrific supporter of Clarity over the years.) Finally, Peter arranged for the Mallesons firm to suggest some design improvements for our website; Mark Adler has those suggestions and should be making the improvements soon. Everyone who knows Peter knows what a gentleman and scholar he is. For the last three years, he has been an outstanding leader as well.

Clarity is in good shape. Our membership has held steady at about 1,000, although we've had to drop members for not paying dues (more on membership in a moment). We now have country representatives in more than 15 countries. And we have enough in our account to cover the next two issues of the journal. The journal's new editor in chief, Michèle Asprey, has undertaken the task with great energy and skill. For this latest issue, David Elliott served as guest editor, soliciting most of the articles and editing together with Michèle. David has been a loyal and active Clarity member for many years. My sincere thanks to Michèle and David for this fine issue of *Clarity*.

The big news is Clarity's Second International Conference, to be held in Boulogne-sur-Mer, France, at the Université du Littoral Côte d'Opale, July 5–9, 2005. The Call for Papers appears on pages 32–33 of this issue. As you can see, this promises to be an extraordinary international conference. Our French representative, Anne Wagner, has taken the lead in planning it and has already done considerable work. She has been helped by Nicole Fernbach, another longtime Clarity member. The Statute Law Society has again agreed to join us in organizing the conference. You will not want to miss it. The latest details will be posted on the conference website—<http://www.univ-littoral.fr/appcoll.htm>.

My main goal in the next three years is simple but ambitious: increase Clarity's membership by several hundred. That will take a team effort—by the country representatives and members alike. The key to recruiting is persistence. Please consider asking friends and colleagues to join. If you could put some Clarity brochures in good hands, let me know, and I'll be glad to send you a bunch. And let me or a committee member know if you can think of avenues that we have not explored.

Finally, a few gentle reminders. Please send your e-mail address to Mark Adler—adler@adler.demon.co.uk—so he can add you to his e-mail list for Clarity announcements. If you have any news about yourself, send it to Michèle Asprey. Also send her any letter that you might like published in the journal. And if you have not yet paid your 2004 dues (due on January 1), please send them to your country representative.

My thanks, again, to everyone who makes Clarity a success—the country representatives and other committee members, the editors, the writers who publish in this journal, and all the members who are joined in the good fight for plain legal language.

Joe Kimble
kimblej@cooley.edu

Clarity Annual General Meeting

Held on 7 February 2004 at Lincoln's Inn, London. 21 came, from Australia, England, Holland, Israel, Sweden and South Africa.

The usual formal business. Officers were re-elected. Resignations from the committee were noted. John Pare gave the Treasurer's report.

Joe Kimble's presidential report was read. 2003 may have been Clarity's most successful year. We have added several new country reps. Finances are in good shape. Thanks are due to Phil Knight for his years as editor in chief and to Michèle Asprey for taking on that role. *Clarity* issues 51 and 52 are in preparation. Thanks too for Peter Butt's outstanding leadership over the past 3 years. He has organised our first brochure, generously financed by Mallesons Stephen Jaques, the Australian law firm that is also helping to redesign our website. A conference in France is planned for summer 2005.

Clarity meetings buzz with ideas. This was no exception. On marketing ourselves

- target professional support lawyers
- capture more corporate memberships; we need to identify the relevant individuals in large organisations—as well as legal firms, the Law Commission, Law Society and Institute of Legal Executives were mentioned
- offer to talk to firms on the benefits of using plain language
- possibly allow firms who use plain language to use our logo as “supporters of Clarity”?

We should meet more often, and 2-3 meetings a year in London over dinner were suggested. And how about an electronic discussion forum?

After coffee our guests Ken Astridge and Marco Stella from Mallesons Stephen Jaques told the story of plain language in their firm. There was no formal decision to adopt it. Plain language was not directly marketed.

The drivers were the Senior Partner's address in 1992 “Just Language”, the need to standardise documents following a 1986 merger, a court decision criticising a “woefully drafted” document, and the influence of some well known plain language specialists who have worked for Mallesons Stephen Jaques and produced their manual “Plainly the Best”.

Today performance is judged not only on understanding the law, but on ability to communicate. Clients comment not on the plain language so much as whether the document works for them, how efficient it is.

We were shown how a traditional precedent had evolved to today's tabular format, index at the end, précis at the front, and how the use of language had changed also. This would not have been possible without technological change. They now had massive databases with sophisticated search engines, a separate database of the “best” documents, and were working on collaborative drafting techniques.

Discussion continued over lunch in a local restaurant.

Reported by Paul Clark
pec@crippslaw.com

UK *Unfair Terms in Consumer Contracts Regulations 1999* applies to land-related transactions

From Clarity member Bob Lowe's Busy Solicitors' Digest:

The Court of Appeal has confirmed that the *Unfair Terms in Consumer Contracts Regulations 1999* do apply to the sale and lease of houses and flats (which [and this is Mark Adler's gloss] means that leases to consumers—as defined by the regulations—must be in plain language).

Newham London Borough Council v. Khatun (Office of Fair Trading as interested party): 2004 EWCA Civ 55 and see OFT press release 29/04 at <www.of.gov.uk/news/press+releases/2004/29-04.htm>

Plain English in Singapore

The Singapore Academy of Law completed another successful series of workshops on drafting in plain English in February. The 1.5 day Foundation Workshop was booked out with 100 participants. The half day workshops for lawyers in banking, insurance and legislative drafting attracted 79 participants spread across the 3 workshops. The workshops were led by Dr Robert Eagleson.

This is the fourth time that the Academy has conducted the workshops in plain English. The first time was in 1996, when they were led by Ted Kerr and Robert Eagleson, both Clarity members, and by Jim Kennan. The next series in 1998 were led by Mark Adler; the third in 2002 and the fourth in 2004 by Robert Eagleson. The Singapore Academy of Law is to be commended for its continued, enthusiastic and practical

support for plain English. It is encouraging to see so many members of the legal and other professions in Singapore eagerly embracing it.

Professor Hwee Ying Yeo, our Singapore representative, attended at the end of 1 session of the Foundation workshop and along with Robert promoted the cause of Clarity and encouraged participants to subscribe. With the long distance collaboration of Joe Kimble, who had sent sufficient copies, each participant was given 1 issue of *Clarity* from 2003 as an allurement to sign up.

We are looking forward to welcoming our new members and to bolstering the cause in Singapore.

© R Eagleson
Rdeagleson@aol.com

From page 16 ...

The drafting challenge— the drafter's choice ... and what the court said:

- (1) a testator bequeathed “all the residue of the moneys *or* securities for money I may die possessed of”

The court held *or* was to be construed as *and*.

- (2) no person shall be convicted of an offence by reason of an act done or omitted by him while labouring under natural imbecility or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, *and* of knowing that such an act or omission was wrong.

The word *and* was construed as *or*.

- (3) The application to the court, according to Associated Press, requested an order commanding the City to:

cease and desist issuing marriage licenses to *and/or* solemnizing marriages of same-sex couples in San Francisco; to show cause before this court.

The judge was seemingly unconcerned about the *and/or*, but the semi-colon bothered him—the judge is reported to have said:

I am not trying to be petty here, but it is a big deal ... that semicolon is a big deal. The way you've written this it has a semicolon where it should have the word “or”. I don't have the authority to issue it under these circumstances.

Couldn't the court also have rejected the application for uncertainty?

Membership matters

New members

Australia

Annette Corrigan
Plain Language Australia
Fortitude Valley, Queensland

Corrs Chambers Westgarth
[Pam Norman]
Sydney

Athina McGregor
Epping, New South Wales

Belgium

Mikael Johansson, Translator,
European Commission
Brussels

Canada

Judi Dalling
Vancouver, British Columbia

Legal Information
Society of Nova Scotia
[Maria Franks]
Halifax, Nova Scotia

Office of Legislative
Counsel (Ontario)
[Shelia Cumberland]
Toronto

England

Arnheim & Co.
[Christopher Arnheim]
Bromley, Kent

Ian Barnett
NBM Dale
Plymouth, Devon

Bircham Dyson Bell
[Librarian]
Westminster, London

Carr Consultancy
[Sarah Carr]
Culcheth, Warrington

Charles Russell
[Alison Owen]
London

Denton Wilde Sapte
[Rachel Serbos]
London

Robin Ellison
Pinsents
London

The Family Law Partnership
[Jenny Gracie]
Leatherhead, Surrey

Carol Ronan-Heath, DLA
London

The Royal Bank of Scotland
Asset Finance
[Terry Willis]
Redhill, Surrey

Sarah Teale
Olswang
East Grinstead, West Sussex

Richard Wheen
Linklaters
Buckland, Betchworth, Surrey

Germany

Werner Meus, Attorney
CBH Law Offices
Cologne

Japan

Kyal Hill, Legal Translator
Tokyo

Scotland

Ken Ross
Orkney Islands Council
South Ronaldsay, Orkney

Singapore

Low Sok Yin
Singapore Exchange Ltd.

South Africa

Shaazia Bhaktawar
Competition Tribunal
South Africa
Pretoria

Thabelo Masithulela
Competition Tribunal
South Africa
Pretoria

Malanee Modise
Competition Tribunal
South Africa
Pretoria

Spain

Inigo Sagardoy de Simon,
Attorney
Madrid

Sweden

Lena Blomquist
Hogsta domstolen (Supreme Court)
Stockholm

Dr. Britt-Louise Gunnarsson
FUMS Dept. of Scandinavian Language
Uppsala

Nathalie Pares, Language Consultant
Stockholm

United States

Bruce Bowers
Austin, Texas

Josiah Fisk, Writer
Firehouse Financial Communications
Malden, Massachusetts

Ed Gold, President
Robinson Gold Associates
Washington, D.C.

Mark Hochhauser, Consultant
Golden Valley, Minnesota

MJ Reilly, Writer
Hally Enterprises, Inc.
Babylon, New York

Retirement

Nick Lear has resigned from the Clarity Committee, and no longer practises as a solicitor. He remains as a Clarity member and is still willing to help the Committee whenever they need him. We thank Nick for all his contributions as a Committee member, and we wish him well in his retirement.

Nick says:

I have greatly enjoyed my association with Clarity from the time it was formed. I am delighted to see the way it has recently developed into an international body of international standing. I am full of admiration for the way [Mark Adler and the Committee] held the tiller for a great part of the last however-many years. And, while I'm in sycophantic mode, the new lot are rising splendidly to the challenge of the "hard act to follow".

Thanks, Nick. And keep in touch!

Application for membership in Clarity

Individuals complete sections 1 and 3; organisations, 2 and 3

1 Individuals

Title *Given name* *Family name*

Name

Firm Position

Qualifications

2 Organisations

Name

Contact Name

3 Individuals and organisations

Address

Phone Fax

Email

Main activities

Annual subscription

Australia	A\$35
Brazil	R50
Canada	C\$30
France	€25
Hong Kong	HK\$200
India	R1225
Israel	NIS125
Italy	€25
Japan	¥3000
Malaysia	RM95
New Zealand	NZ\$50
Singapore	S\$40
South Africa	R100
Sweden	SEK250
Thailand	THB1000
UK	£15
USA	US\$25
Other European countries	€25
All other countries	US\$25

How to join

Complete the application form and send it with your subscription to your country representative listed on page 2. If you are in Europe and there is no representative for your country, send it to the European representative. Otherwise, if there is no representative for your country, send it to the USA representative.

Please make all amounts payable to Clarity. If you are sending your subscription to the USA representative from outside the USA, please send a bank draft payable in US dollars and drawn on a US bank; otherwise we have to pay a conversion charge that is larger than your subscription.

Privacy policy

Your details are kept on a computer. By completing this form, you consent to your details being given to other members or interested non-members but only for purposes connected with Clarity's aims. If you object to either of these policies, please tell your country representative. We do not give or sell your details to organisations for their mailing lists.