



# The Case for Plain English

By Daniel U. Smith



Daniel U. Smith

**I**f you can't write, you can't win." This warning comes from the Hon. William D. Stein, Associate Justice of the California Court of Appeal. The Recorder, May 21, 1997, p. 1.

But what are the qualities that win? This vital question divides lawyers into two camps.

One camp prefers the scholarly style — big words, long sentences, complex constructions, frequent digressions, and overwhelming detail. The scholarly style attempts to appear authoritative to impress the reader. But the scholarly style often burdens the reader. To sample these burdens, read *Pennoyer v. Neff*, 95 U.S. 714 (1877). For most law students, the turgid style of 19th century opinions like *Pennoyer* and the dense prose of many law review articles became the model.

The other camp prefers Plain English —

brevity, simplicity, and a clear train of thought. Plain English is transparent, revealing the facts and the law. Plain English puts the writer in the background, to impress the reader with content rather than style. Plain English satisfies the "ethics of writing": that "the reader's part...must never become a strain." J. Barzun, *Simple and Direct* (1985) p. 7.

Plain English is rarely taught in college or law school. It is thought to be low-brow, the domain of lesser writers. The fear is that, because Plain English sounds simple, the reader will infer the writer is simple.

Yet Plain English has won support in high places.

## — Support for Plain English —

In 2003, California's Judicial Council issued new civil jury instructions in Plain English. The new instructions eliminate redundancies — "injury, damage, loss, or harm" (BAJI 3.76) is now "harm." CACI 430. The new instructions avoid legal jargon — "circumstantial evidence" is now "indirect evidence" (CACI 202); "preponderance of the evidence" is now "more likely to be true than not true" (CACI 200). The new instructions avoid negative and passive constructions — the old instruction that "Failure of

.....  
*Mr. Smith is a Certified Appellate Specialist, State Bar Board of Legal Specialization, in Kentfield and a member of the California Academy of Appellate Lawyers. He teaches "Persuasive Legal Writing" to law firms, bar associations, and for CEB.*  
.....

California Litigation Vol. 17 • No 2 • 2004



recollection is common. Innocent misrecollection is not uncommon” (BAJI 2.21) is now “People often forget things or make mistakes in what they remember.” CACI 107.

Use of the new instructions “is strongly encouraged.” Rule 855, subd.(e). This commitment to Plain English by the Judicial Council (and by Chief Justice Ronald M. George) is instructive. Advocates should infer that, as Plain English instructions benefit juries, so Plain English briefs benefit judges.

Another government agency committed to Plain English is the Securities and Exchange Commission. To help lawyers write clear disclosure documents, the SEC has published “A Plain English Handbook: How to Create Clear SEC Disclosure Documents” (1998). This Plain English Handbook shows how to write “at a level the audience can understand.” [www.sec.gov/pdf/handbook.pdf](http://www.sec.gov/pdf/handbook.pdf), p. 7. SEC Rule 421 requires disclosure documents to use “definite, concrete, everyday words.”

Your writer, after 35 years of reading and writing appellate briefs, is also committed to Plain English. Let me first explain why Plain English is more effective in persuading a judge, and then suggest ways for lawyers to acquire a Plain English style.

### **— The Persuasive Power of Plain English —**

For three reasons, Plain English is more persuasive than the scholarly style.

First, Plain English makes information more accessible. As Ninth Circuit Judge Kozinski wrote, “simple, direct language is more persuasive than convoluted language” because simple language “is more easily grasped” and “forces the writer to focus his thinking and sharpen the argument.” E-mail from Judge Kozinski to Daniel U. Smith, April 25, 2002. By contrast, “abstract language can be easily waved aside by someone who is leaning the other way.” For Judge Kozinski, “simplifying and clarifying is not just a nice thing

to do to be kind to the judges. It’s really *the essence of advocacy.*” (Emphasis added.)

Second, Plain English puts the content in the foreground and the writer in the background. This arrangement is superior be-

---

‘*First, Plain English  
makes information  
more accessible...*

*Second, Plain English  
puts the content in the  
foreground and the writer  
in the background...*

*Third, Plain English elevates  
the lawyer in the eyes of the  
judge and the client.’*

---

cause (1) the lawyer’s view is suspect (lawyers are paid to advocate one side), and (2) judges base their decisions, not on the lawyer’s view of the facts and the law, but on the judge’s view. Hence, judges prefer briefs that



subordinate the writer's view — the opposite of scholarly writing.

Third, Plain English elevates the lawyer in the eyes of the judge and the client. Simplicity in writing “paradoxically...lead[s] readers to conclude that the writer is smarter.” B. Garner, *A Dictionary of Modern American Usage* (Oxford 1998) p. x. Conversely, when a lawyer fails to write with clarity, “to that extent the lawyer's language is a confession of incompetence.” I. Younger, *Persuasive Writing* (Professional Education Group 1990) p. 2.

In short, your style of expression affects the reader's view of you and your credibility. “Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible.... [The speaker's] character may almost be called the most effective means of persuasion he possesses.” R. McKeon, ed., *The Basic Works of Aristotle, Rhetoric, Bk. I: Ch. 2* (Random House 1941) p. 1329. “The way you write reflects the way you think, and the way you think is the mark of the kind of person you are.” Jeffrey McQuain, *Power Language* (1996) p. 149 (quoting William Safire).

For these reasons, Plain English is more persuasive than the scholarly style.

### — Achieving Plain English —

Making the shift to Plain English demands a conscious effort to root out the cumbersome patterns of the scholarly style. Here are six suggestions to acquire the Plain English style.

#### *Brevity, simplicity and clarity.*

Strive for brevity, simplicity and a clear train of thought.

For brevity, “[o]mit needless words.” W. Strunk & E.B. White, *The Elements of Style* (Allyn & Bacon 2000) p. 23. Delete information that is unnecessary, redundant, or implicit. Every word must do useful work.

For simplicity, “[p]refer the short word to the long; the concrete to the abstract; and

the familiar to the unfamiliar.” J. Barzun, *supra*, p. 13. Write about simple, concrete details rather than complex abstractions.

For a clear train of thought, make explicit the link that joins heading to text by starting with a “roadmap” paragraph that expands on the heading and summarizes the point and supporting information to come. Start paragraphs with a topic sentence, then arrange supporting information in a logical way apparent to the reader. Start sentences with signals expressing the logic of the text to come. Limit paragraphs and sentences to one

---

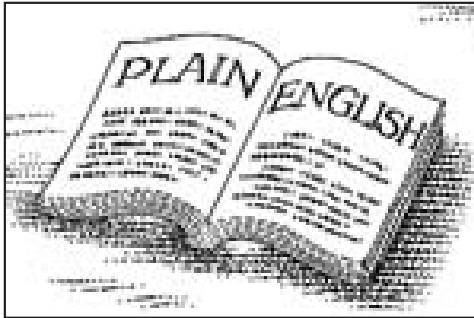
‘Create for your office a manual  
— not about citations,  
but about writing style.’

---

point. State parallel ideas in a parallel manner. To highlight the logic of your thought, use bullets, dashes, colons, semicolons, and parentheses.

#### *Short, colorful words.*

Plain English need not be dull — use short, physical words to create a vivid image. Consider these judicial examples: “The criminal is to go free because the constable has *blundered*.” *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (emphasis added). “[A] *cascade* of exceptions that would engulf the rule.” *Carlisle v. United States*, 517 U.S. 416, 430 (1996) (emphasis added). “[T]he power to ‘control’ a corporation will *fetch* a



substantial premium.” *United States v. Byrum*, 408 U.S. 125, 154 (1972) (emphasis added). “The uncertainty may vex prisoners as well.” *Carey v. Saffold*, 122 S.Ct. 2134, 2146 (2002) (dissent; emphasis added). To keep your writing vibrant, use compact words that sound like their meaning (onomatopoeia).

*An office style manual.*

Create for your office a manual — not about citations, but about writing style. Show how to write headings, sentences, and paragraphs with brevity, simplicity, and a clear train of thought. Offer solutions to the problems facing every advocate: where to put citations (the sentence’s end); where to put the sentence’s point of emphasis (the end); the maximum length of an introductory clause (three words); the maximum length of a heading or sentence (aim for two lines); the format for headings (no underlining, initial caps, or all caps); how to introduce quoted material (with a summary); how to craft an effective introduction; whether and where to state “Issues Presented”; whether headings should be neutral or advocate a point (advocate a point); whether the Statement of Facts needs headings (yes); whether to use contractions (sparingly); and how to avoid the passive voice, negative constructions, and nominalizations.

List wordy constructions with possible revisions: “prior to the commencement of trial” can be shortened to “before trial”;

“according to the evidence in the record in this case, Jones said” can be shortened to “Jones said.”

List short substitutes for big words: accordingly = hence; demonstrate = show; depart = go; desist = stop; despite the fact that = though; detain = hold; discover = find; donate = give; however = but; inasmuch as = because; nevertheless = yet; notwithstanding = despite; subsequently = later.

List hollow qualifiers and clichés you can eliminate with no loss in meaning — e.g., “clearly,” “entirely,” “very,” “fundamentally,” “it should be noted,” “in this case,” “obviously,” “that said,” “at the end of the day.”

These examples are just a start. For a comprehensive list of Plain English substitutes for cluttered phrases, see Bruce Ross-Larson, *Edit Yourself* (W.W. Norton & Co. 1996).

Insights for your office style manual can be found in articles and books on Plain English by judges, lawyers, and writing gurus. In addition to the sources cited above, read the following: Hon. Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L.Rev. 431 (1986) (especially the tips in the appendix); Hon. Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325; Bryan Garner, *Legal Writing in Plain English* (Chicago 2001); David Lambuth, *The Golden Book on Writing* (Penguin Books 1987); Bruce Ross-Larson, *Effective Writing* (W.W. Norton & Co. 1999); Joseph Williams, *Style — Ten Lessons in Clarity and Grace* (Addison-Wesley 1999); Richard Wydick, *Plain English for Lawyers* (Carolina Academic Press 2001); William Zinsser, *On Writing Well* (Harper Collins 2001).

For reference, use Bryan Garner’s *A Dictionary of Modern American Usage* (Oxford University Press 2003). This valuable aid will keep you from stumbling over tricky words and phrases (see Garner’s advice on “hopefully” and “sanction”). Also, Garner offers useful guidance on a writer’s choices: abbreviations

viations, adjectives, adverbs, contractions, document design, footnotes, negatives, parallelism, passive voice, possessives, punctuation, quotations, sexism, split infinitives, and superstitions (*e.g.*, against the one-sentence paragraph or starting sentences with “and,” “but,” or “because”).

---

‘*Email cries out for Plain English — use it. Revise your emails at least once to omit needless words, choose the simplest word and construction, and create a clear train of thought.*’

---

*Relentless editing.*

Place a high value on editing. “Rewriting is the essence of writing well; it’s when the game is won or lost.... The newly hatched sentence almost always has something wrong with it.... [C]lear writing is the result of a lot of tinkering.” W. Zinsser, *supra*, p. 85. Though your research and reasoning be impeccable, they are not enough. Relentless editing is also required to persuade the judge.

To improve your editing, try these tech-

niques: edit the hard copy (not just on screen); edit headings in the table of contents (where the judge will first read them); edit away from the office (at home, a restaurant, a library); ask a colleague unfamiliar with the case to edit; read important parts aloud (especially the introduction); edit one level at a time (headings, topic sentences; paragraphs); complete the document well before filing day and ignore it for a day before the final edit.

Rigorous editing improves client relations. Clients value the lawyer who presents their case in a style they can readily understand. If you explain to clients why thorough editing makes your briefs more persuasive, they will appreciate the time you spend (and bill for) editing.

*Internal office documents in Plain English.*

Set an example. Write internal office memos in Plain English to show lawyers and support staff why and how to write Plain English themselves.

*Email and voicemail.*

Email cries out for Plain English — use it. Revise your emails at least once to omit needless words, choose the simplest word and construction, and create a clear train of thought. On your voicemail, make your outgoing message as short as possible. Don’t waste callers’ time explaining why you can’t answer (they don’t care) or instructing callers how to leave a message (they know already). By shortening your voicemail message, you show the world (and yourself) you are committed to brevity and simplicity.

In the pursuit of Plain English, perfection is probably unattainable. Even E.B. White, dedicated to deleting the phrase “the fact that” from “every sentence in which it occurs,” failed half the time. Strunk & White, *supra*, p. xvi. Yet the commitment to write Plain English is worthwhile for all concerned. Clarity in writing requires clarity in thinking, which benefits the lawyer, the judge, and the client.