

# **WHY LAWYERS STRUGGLE WITH PLAIN ENGLISH**

by Richard Castle

## **The special considerations for legal documents**

Many lawyers and a few respected laypeople have thought that legal language is bound to be different from other forms of language. After all, formal legal texts serve a special purpose, namely to bring about a change in the law. That change may affect whole countries (in the case of treaties) everyone within a country (in the case of general acts of parliament) or named parties and possibly their successors (in the case of contracts). Even one-party documents like wills and change-of-name deeds alter the way the world deals with a person's affairs. What is more, because of the possibility of challenge in the courts, legal documents need to be precise and unambiguous. So they have to reject many of the mechanisms of ordinary writing like figures of speech, intentional humour, some punctuation and the introduction of emotion. It follows that legal language is a bare form, stripped of many of the devices that a poet, a novelist or a biographer would use.

Traditional legal writing has been called wordy, unclear, pompous and dull — and it is. Why should that be? Any number of reasons have been given. Not all of them apply all the time, and sometimes an effect is weak, sometimes strong. Often the reasons are in conflict, and they are not all equally valid. Let's see what some of them are.

## **Reasons for traditional legal drafting**

### Familiarity and habit

We all prefer the familiar to the new. Additionally, most firms have an extensive library of standard documents (called 'precedents') nowadays stored in electronic form. Precedents are necessary in the hurly-burly of practice, but updating them calls for a substantial investment of time, effort and money. In the short term, that investment is a large office overhead for no immediate return, because it cannot be billed direct to a client. And many documents are bound to be long and complicated. A lease of a flat at a premium, levying charges for a sinking fund and containing qualified restrictions on disposal, for example, is inevitably lengthy. No wonder that lawyers continue to use old precedents which are outdated in style yet still effective.

### Conservatism

Lawyers are conservative by nature, and their training encourages them to look back to decided cases. Their reasoning proceeds by analogy, and much of the non-criminal law (particularly the law relating to civil wrongs) is judge-made.

### Fear of negligence claims

There is no shortage of lawyers prepared to sue other lawyers. Clients are increasingly litigious. If something goes wrong, blame the lawyer! The approach is ridiculous, but one which all too many clients are prepared to adopt.

### The means of production

Legal documents used to be hand-written by poorly-paid clerks; now they are often prepared by fee-earners themselves on computers. Typewriters, early word-processors and dictating machines were the same: they all encouraged the production of documents which were long and over-complex.

### Professional pressures

Lawyers work under enormous pressure. Private practice is certainly no easy way to earn a living. In most firms, a lawyer's worth is measured by billable hours. That's no incentive to write short, sharp documents. Moreover, most documents come under scrutiny in draft by other lawyers before the documents reach their final form. A form, language and layout which is familiar to other lawyers will therefore get the job through more easily.

### Straining to avoid ambiguity

A legal document is almost always badly flawed if it can genuinely bear more than one meaning, even in context. Lawyers are well aware of this, and strive mightily to avoid it. At best, ambiguity will lead to misunderstanding. It might also give rise to expensive litigation. In consequence, documents become cluttered, fussy and over-particular — sometimes at the expense of clarity if the unexpected does occur.

### The mixture of languages

English draws its vocabulary from a variety of sources. This is sometimes given as justification for the familiar doublings and triplings such as 'goods and chattels' (Old English and Old French) and 'give, devise and bequeath' (Old English, mediaeval Latin and Old English). Patently, that reasoning is false in many instances. Anyway, the richness of the language should enable lawyers (like anyone else) to choose the most appropriate word and stick with it.

### Payment by length

In the old days, lawyers were paid by the length of the document. That no longer applies, but a residue of the idea lingers.

### Payment by time

Lawyers frequently charge by reference to an hourly rate. What motivation does that give them to produce a document quickly?

### The litigious environment

Those lawyers who are of a nervous disposition (and there are plenty of them) are always looking over their shoulders at what a judge might one day say about the document they have so carefully crafted. Better for those people to do things in the traditional way than risk public humiliation at the hands of a critical judge.

## **The riposte**

A legal document, whether public or private, has several functions. The primary one is to carry out a legal purpose, but there are others: to communicate, to inform, and to persuade. A private document creates law for the parties, governing their relationship for a specified time and for a specified purpose. In laying down that personal law, there is no good reason to use any style except plain modern English.

Specialists can talk to specialists in special language if they wish. An expert in heraldry may describe an armorial bearing to another expert in language which is precise and unambiguous, but unintelligible to the uninitiated. Nothing much turns on the unintelligibility of their language to outsiders. But law is different. Law is involved with the whole world, with life and with people. Legal language should no more be confined to coded messages than language generally.

Modern standard English is as capable of precision as traditional legal English. It can cope with the concepts and complexities of the law and legal processes. The few technical terms that a lawyer might feel compelled to keep for convenience or necessity can be incorporated without destroying the document's integrity. The English of a legal document will never read like a novel, but it can be attractive in way which is crisp, clear and functional. At its best, it's a type of literature.

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