

Plain Meaning,  
Plain Language,  
Plain English:  
A Farewell to  
Hereby, Come Now,  
and To Wit

by Professor Cate Brooks

“TO WIT—  
now what is that about?”

As the only lawyer in my family, I find myself fielding questions about our legal language from time to time. The answers my family members suggest to me betray a certain disgruntled reaction to the legal documents of daily life that they struggle to decipher. “TO WIT - that’s just a slow way to say twit, right?” “TO WIT - is that the infinitive form of being clever? Well, this insurance form isn’t!”

Then, of course, there are the herebys, wherefores, whences, and all those other beloved, archaic words that find a home in “legalese.” Well, there is a pejorative description: “legalese--a noun, meaning language designed to obfuscate, confuse, divert, or anesthetize its readers, and to provoke disrespect of its writers.” Why do we lawyers use such an unpopular form of communication? Do we have to? Can we stop? Can we substitute something that will cause readers (and writers) less grief?

First of all, why do we use word forms that are stilted and slow to yield their meaning to the lay reader? What do we gain from communicating in a way that provokes frustration and distrust from the very people we seek to serve?

I doubt a layperson could understand our genuine reluctance to change the way we speak and write. That very reluctance, though, evinces the humanness we are accused of lacking. We resist change, often for what we believe are very good reasons. If we drop our legalese and adopt plain English in our lawyering, we will be setting aside over four

centuries of legal expressions and forms of speech. It is a rare human being who is comfortable with that much change – let alone change that goes to the core of how we see ourselves embedded in tradition and precedent.

For half a millennium, we lawyers have written our work in the English language. Before then the languages of the law were French and Latin. How challenging to have left Latin and French behind and to work in the people’s own language, the vernacular of the time. Once again, the legal profession is moving to the current vernacular as the Plain English movement gains momentum here, in Great Britain, and in other English speaking nations. What a change we are undergoing again.



Professor Cate Brooks teaches at Creighton University School of Law; her areas of research, teaching, and practice are family and children’s law. Brooks is a co-author of *Children’s Rights in the United States: In Search of National Policy, 1999*. She is currently working on a legal reference book for mental health practitioners in Nebraska.

The idea of plain language itself, though, is not new at all. There are beautiful old legal texts in the library at the Creighton University Law School, which predate the move to use English to record legal proceedings. When I've translated parts of those texts, the ancient French and Latin words speak quite clearly of the times in which they were written. The language used is straightforward and plainspoken, elegant in its phrasing and vocabulary.

What was plain more than 400 years ago, however, has become fancy, tied to that other time, and quite unclear in today's world. As we mimic that early English in our own legal writing, we use words no longer found in common speech. As we imitate the French cadences and Latinate placement of words that do not fit English (modern or medieval), we make ourselves difficult, perhaps impossible, to be understood by the lay persons for and to whom we are writing. In fact, we are accused of that very fault; and unethical, if not illegal, motivations are ascribed to us for the density of our writing and the difficulties we pose to our readers.

Richard Wydick offers a funny view of early English legalese in his book, *Plain English For Lawyers* (1994):

In 1596, an English chancellor decided to make an example of a particularly prolix document filed in his court. The chancellor first ordered a hole cut through the center of the document, all 120 pages of it. Then he ordered that the person who wrote it should have his head stuffed through the hole, and the unfortunate

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fellow was led around to be exhibited to all those attending court at Westminster Hall.

Ouch. We resist the change from legalese to plain English not because we wish to be obtuse and stuck in the past. Rather, we share beliefs about the efficacy of our old language and its important role in providing thorough protection of our clients' interests. One author, writing about the Plain English movement in Great Britain today, put the problem this way:

Many lawyers still believe that:

- plain English means sacrificing precision and certainty in a search for clarity
- the language of the law would lose its grandeur if it were written in a plain English style

- they do not have time to redraft standard legal texts
- judges and clients expect and prefer the traditional drafting style.

(Maher, *Plain English*, [www.plainenglish.co.uk](http://www.plainenglish.co.uk))

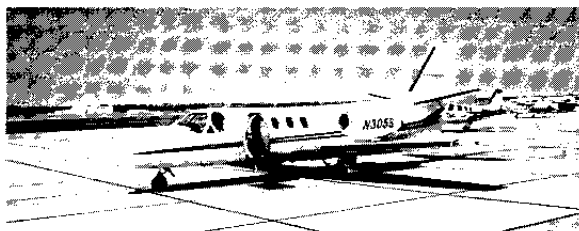
There are, of course, more reasons than those that Maher politely cites. We lawyers like to soften the blow, for ourselves and others, of our angry or injuring words. An example of this use can be found in the resignation of Richard M. Nixon: "I hereby resign the Office of the President of the United States" (1974). Every word of that brief sentence is necessary to express the president's intent --except "hereby." What exactly does "hereby" do for that statement? It lengthens the statement, and length has a softening effect for the speaker as well as the listener. It places the statement in the realm of a lawyer's pronouncement and tends to distance the speaker from his own unlawful conduct. As a word of legal formula, it lends formality and thus dignity -- here to an event of extraordinary formality and dignity, the lawful surrender of elected office. That act needs no gilding. Perhaps the president felt the need to add dignity to himself.

We lawyers also speak and write to create precision; we try to avoid unintended consequences; we work for predictability and control over the events we address. We have come to believe that wordiness is an effective way to achieve our goals. Words are an effective means to our end; wordiness may not be. In fact, wordiness may cause the one outcome we abhor: Our words may be ignored because reading them is tedious, confusing, and boring.

*Continued on page 14*

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Thus, when wordiness is perceived as "filler" and not the precise, client-protecting language we intend, we create the very problem we thought we were curing -- the client who is uninformed and therefore vulnerable.

Worse yet, our wordiness may be ignored because our readers may attribute insincerity to writers they do not understand. George Hathaway, the chair of the Plain English Committee of the State Bar of Michigan, notes an insight by George Orwell that makes a strong argument for the implementation of plain language drafting. Orwell would see Plain English as a countermeasure to our readers' dismay at our wordiness:

The great enemy of clear language is insincerity. When there is a gap between one's real and one's declared aims one turns as it were instinctively to long words and exhausted idioms, like a cuttlefish [octopus] squirting out ink.

(Hathaway, *Plain English*, [www.michbar.org/committees/penglish/pengcom.html](http://www.michbar.org/committees/penglish/pengcom.html); quoting Orwell, *Politics and the English Language*, 1946; brackets in Hathaway's quotation.)

Simple language, plainly written and said, projects a sincere expression of ideas. No one would risk baffling a jury during closing argument. Doing so would doom one's case. Yet we risk baffling our clients and our clients' customers whenever we use language that is unfamiliar and even undecipherable to them. So clients and others complain that we use legalese to keep ourselves and our professional colleagues employed -- as only lawyers comprehend the language we are accused of inventing. The countermeasure of Plain English would go far in appeasing our lay readers' fears of insincerity.

### It is no easy task to speak plainly.

Legalese does yield one comfort: Clients do not accuse us of making our own lives easier by immersing ourselves in legalese. They may believe that we understand it, perhaps that we even like it but clients usually do not confuse fluency with facility. So, while they may welcome our efforts to speak and write in Plain English, they may not appreciate how hard it is to do. (That is to say, until they try it themselves.) Much of our work involves a three-step process: (1) trying to decipher what our clients want; (2) then translating the lawful means to those goals

WHEREFORE

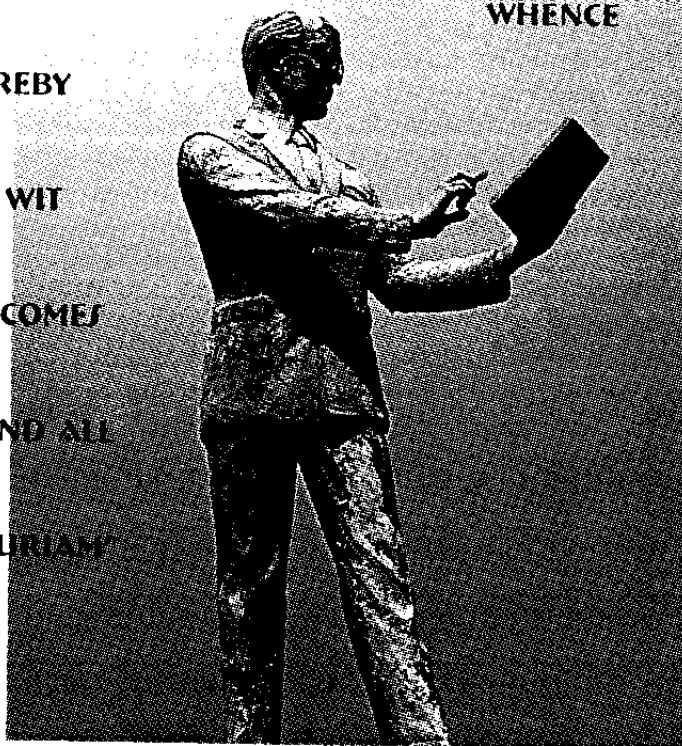
HEREBY

TO WIT

NOW COMES

ANY AND ALL

"PER CURIAM"



WHENCE

into our complex language; and (3) when our clients come upon the inevitable obstacles to what they want, engaging with opposing counsel, in adversity or collaboration, to determine an outcome. The Plain English movement suggests that we alter the second part of that sequence, and offers as the reward far fewer instances of having to contend with the third: clarity for the client yields smoother paths to client goals, which is why clients come through our doors in the first place.

Writing and speaking plainly is hard work. However, as lawyers thrive on intellectual hard work, we should have no qualms about embracing Plain English in legal drafting -- once we are convinced of its merits. What goes into plain language drafting is probably best explained by what should come out of our repertoire. The Michigan State Bar Committee on Plain English offers these examples at its web site:

#### Legalese

1. Formalisms such as "Now Comes" [A familiar example, isn't it?]
2. Archaic words such as "hereby" [Herein, hereinbefore, here...whatever.]
3. Redundancies such as "any and all" instead of "any" [They really do the same job.]

4. Latin words such as "per curiam" instead of "by the court" ["Pro majori cautela" may be a better example.]

#### Legalese Compounded

1. Long average sentence length [My computer says I'm guilty of one sentence in this article containing 64 words! Can't be true!!]
2. Weak passive voice verbs [This is one that I know I'm guilty of!]
3. Wordy phrases such as "prior to" instead of "before" [Or "in consideration of," "despite the fact that," insert your favorite.]
4. Unnecessarily long words such as "utilize" instead of "use" [Some friends think I've written this whole article just to see this last point in print!]

Well, that is a good start for editing out what we should not be doing. Of course, it might be helpful to talk about what we should do. Many of the Principles of Clear Writing published by the National Archives and Records Administration we know by heart and use daily.

#### For example:

Write in the active voice.  
Use action verbs.  
Be direct.

Use the present tense.  
Write positively.  
Don't use words that antagonize.  
Make lists clear and logical in structure.

**Some we may not think about:**

Use "must" instead of "shall."  
Avoid use of exceptions.  
Use parallel construction.  
Use the singular noun rather than the plural noun.  
Use concrete words.  
Write short sentences.  
Use short paragraphs.

**And some principles, when violated, set our teeth on edge:**


Avoid split infinitives.  
Be consistent. Don't use different words to denote the same things.  
Omit needless words.  
Avoid redundancies.  
Avoid noun sandwiches.  
Don't use gender-specific terms.

More advice is available in Wydick's *Plain English for Lawyers*, which is full of helpful suggestions and practical applications. It also includes numerous (and fun) exercises for developing the habits of plain language drafting.

**Other lawyers' good examples lead the way.**

The Michigan State Bar has been among the leaders of the Plain English movement here in the United States. Nearly two decades of work has resulted in praiseworthy success. Nearly all Michigan statutes are written in plain language as are most governmental administrative rules. Lawyers drafting lawsuit papers are guided by plain language form books created by the Michigan Institute for Continuing Legal Education. The state bar association also gives Clarity Awards in 20 categories of legal writing, from legislation to car loan agreements to home equity loans. Should Nebraska be far behind?

In the new "info speak" of the computer age, we lawyers often find ourselves in the position of clients who do not quite understand what we are buying, and are put off by the jargon of the e-everything industry. We are even intimidated at times (by our own ignorance) into not asking the questions we should when our secretaries and technical assistants seem to know more than we do.

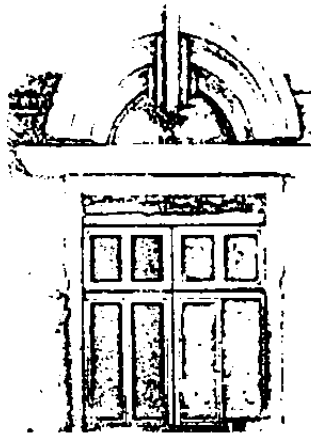
What better way could we have to understand our clients' discomfort -- and, in understanding, change. 

*The NSBA Publications Committee recently formed a subcommittee on Plain English. The subcommittee's mission is to promote the use of Plain English in all aspects of the practice of law. Bill Morris, chair of the Publications Committee, asked Creighton University School of Law Professor Cate Brooks to write an article for TNL introducing to the Nebraska Bar the concept of Plain English. Nebraska lawyers interested in joining the effort to promote the use of Plain English in the language of the law should contact Jennifer Schizas, NSBA director of communications, (402) 475-7091 or Bill Morris, (402) 434-9090.*

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