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Plain English Part I: Secrets for the SEC

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The Scrivener: Modern Legal Writing



Plain English Part I: Secrets from the SEC

by K.K. DuVivier

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Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember the reason.

Fortescue, C.J.¹

Studies have shown that traditional legal writing has four main characteristics: it is “wordy,” “unclear,” “pompous,” and “dull.”² Furthermore, law books have been dubbed “the largest body of poorly written literature ever created by the human race.”³ Although some lawyers intend to perpetuate this tradition, most have recognized the benefit of converting to “plain English.”

The plain English movement started around 1970. Its objective is to improve clarity, and the movement now is active in the United States, Canada, England, and Australia. Since its inception, plain English has been implemented successfully in many areas. For example, the number of collection lawsuits dropped dramatically when Citibank started using a plain English promissory note. With plain language, borrowers did not sue because they had a better understanding of their obligations under the promissory note.⁴

Several federal agencies, such as the Federal Communications Commission, Small Business Administration, and Department of the Interior, have redrafted regulations and legal documents in plain English. In the last year, the Securities and Exchange Commission proposed that portions of the disclosures in prospectuses be drafted in plain English.⁵

But what is “plain English”? Colorado’s “plain language” statute seems to define it as “plain, nontechnical language [written] in a clear and coherent manner using words with common and everyday meaning which are understandable to

the average reader.”⁶ In its proposed rules for plain English disclosures, the SEC provides more specific guidelines in the form of six “clear writing techniques to communicate information,” as follows:

- 1) Active voice;
- 2) Short sentences;
- 3) Definite, concrete, everyday language;
- 4) Tabular presentation and “bullet lists” for complex material whenever possible;
- 5) No legal jargon or highly technical business terms; and
- 6) No multiple negatives.

Because mastery of these six techniques will improve legal writing in most situations, I will explore each of them in depth in this and future columns.

1. Active Voice

An active voice sentence follows a subject-verb-object sequence. For example, *The girl* (subject/actor) *kicked* (verb/action) *the ball* (object/object of action). In contrast, a passive construction follows an object-verb-subject sequence. For example, *The ball* (object of action) *was kicked* (verb/action) *by the girl* (subject/actor). As these examples show, the passive construction generally is longer and more difficult to read. Furthermore, you risk obscuring the narrative if the actor is never identified—*The ball was kicked*. The SEC provides the following examples for clarifying sentences by eliminating the passive voice:

Before Revision

No person has been authorized to give any information or make any representation other than those contained or incorporated by reference in this joint proxy statement/prospectus, and, if given or made, such information or representation must not be relied upon as having been authorized.

The proxies solicited hereby for the Heartland Meeting may be revoked, subject to the procedures described herein, at any time up to and including the date of the Heartland Meeting.

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through *The Scrivener* column. Send your questions to: K.K. DuVivier, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401 or through e-mail to: duvivier@spot.colorado.edu.

K.K. DuVivier is a senior instructor of Legal Writing and Appellate Court Advocacy at the University of Colorado School of Law, Boulder.

After Revision

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You may revoke your proxy at any time up to and including the day of the meeting by following the directions on page 18.⁷

Discussion

Notice that the SEC's recommended revisions introduce the first-person pronoun "we" and the second-person pronoun "you" into the text to avoid the passive voice. While this technique is useful in informal contexts and may be acceptable in a prospectus, be cautious about using it universally.

The passive voice is appropriate in some legal contexts: "I" and "you" are rarely used in legal memoranda or briefs.⁸ It creates an informal tone with documents that should be formal and professional. The use of "I" or "we" incorrectly emphasizes the writer rather than the facts and the application of law to those facts. Furthermore, references to the readers as "you" may seem pushy or disrespectful and may anger a client or judge.⁹

Even when the passive voice may be appropriate, lawyers tend to overuse it. Remember that it often is more cumbersome and obscure. If you search, you may find frequent opportunities for making your English more plain by trimming the passive voice.

Before Revision

It was held that information concerning the plaintiff's HIV infection was not of legitimate public concern. Borquez. Simi-

larly, it can be concluded that information concerning Mr. Otto's HIV infection is not a matter of legitimate public concern.

After Revision

In Borquez, information concerning the plaintiff's HIV infection was not of legitimate public concern. Similarly, information concerning Mr. Otto's HIV infection should not be a matter of legitimate public concern.

Conclusion

In future columns, I will discuss the other five "clear writing techniques" outlined by the SEC. Clarity is a sublime goal for any writer, and the SEC's secrets for achieving plain English can help us achieve that goal.

NOTES

1. See *Henry VI* at notes 25b-26 in 3 Holdsworth, *A History of English Law* (3d ed. 1923).
2. Mellinkoff, *The Language of the Law* (Boston, MA: Little, Brown & Co., 1963).
3. Kimble, "Lawyers Need to Learn the Elements of Style," *The National Law J.* (Nov. 10, 1997) at A21, quoting John Lindsey of Temple University.
4. *How Plain English Works for Business: Twelve Case Studies*, U.S. Dept. of Commerce, Office of Consumer Affairs (March 1984).
5. 62 Fed. Reg. 3152 (Jan. 21, 1997).
6. CRS § 2-2-801 (1997).
7. *Supra*, note 5 at 3156.
8. Oates, Enquist & Kunsch, *The Legal Writing Handbook* 875 (Boston, MA: Little, Brown & Co., 1993).
9. *Id.* at 678.

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