Use plain English in legal writing - Advice given by a Judge to lawyers:

by Yang Pei Keng

An American Judge Mark P. Painter from Ohio, United States looks at legal writing from a judge's perspective. He advocates the use of plain English by lawyers. The advice given to American lawyers is also relevant to our legal profession, since the use of plain English is the order of the day.

1. Language and Style

On the issue of language and style, the learned judge is of the view that lawyers should refrain from using more words than necessary. he has this to say:

"Do not use two or three or four words for one ("devise and bequeath"; "grant, bargain, and sell"; "right, title, and interest"; "make, ordain, constitute, and appoint").

According to the learned judge, *"This goofiness originated with the Norman Conquest, after which it was necessary to use both the English and French words so that all could understand."*

2. Avoid using many words

He advises against using many words when one is clear enough.

"Most of us now understand plain English. A related tendency of lawyers is to use many words when one is more understandable. Examples given are:

"sufficient number of"= enough,
"that point in time" = then,
"for the reason that" = because."

3. Eschew legalese

In legal documents, try to avoid using language that is difficult to understand, "Legalese" is the language used in legal documents that is difficult to understand. he said:

"Eschew legalese. "Hereinafter," "aforesaid," and the like do not add anything but wordiness and detract from readability." "Many studies show that legalese is the number one complaint of appellate judges …".

4. Use Latin Phrases sparingly

As to the use of Latin phrases in legal writing, his advice is not to use them too often. His suggestion is:

"Use Latin phrases sparingly. A few — res ipsa loquitur ("the fact speaks for itself"), sua sponte (on its own will or motion, or on its own initiative) — are perhaps acceptable, but do not litter your brief with what Daniel Webster called 'mangled pieces of murdered Latin'."

5. Use active voice in sentences

As to sentence structure, his advice is to use short and simple active voice. Try to avoid passive sentences, if possible:

"Write short, crisp sentences. Use active voice — but not exclusively — there is a place for passive voice. A good rule is to keep passive sentences under 20% of your brief."

6. Avoid using long-winded sentences

The Judge also advises lawyers to use short sentences, instead of long-winded ones:

"Keep sentence length to an average of not more than 15 -18 words. I use the "18 -18" rule—average not more than 18 words per sentence, and 18% passive sentences".

7. Readability is the goal

The Judge hopes that lawyers would keep in mind readability of their legal documents:

"Readability is the goal! Keep in mind Will Rogers's all-too-often-true comment about legal writing: "The minute you read something and you can't understand it, you can almost be sure that it was drawn up by a lawyer. Then if you give it to another lawyer to read and he doesn't know just what it means, then you can be sure it was drawn up by a lawyer. If it's in a few words and is plain and understandable only one way, it was written by a non-lawyer."

8. Use of 'and' and 'but'

"And do not be afraid to start sentences with "and" or "but." This signifies good writing. The reason your grammar-school teacher told you not to start a sentence with "and" was because you wrote, "I have a mother. And a father. And a dog." "Use "but" rather than "however" to start a sentence, and see how much better it reads."

9. Numericals

Judge Mark Painter is not in favour of spelling out numbers and at the same time attaching parenthetical numericals, e.g. *ten (10) persons*. Such inadvisable practice is commonplace among lawyers. He points out:

"Especially irritating is the practice of spelling out numbers and then attaching parenthetical numericals — a habit learned when scribes used quill pens to copy documents. The real reason for this is to prevent fraud, by making it difficult to alter documents."

"A brief that states: "There were two (2) defendants and three (3) police officers present" is extremely hard to read, and also looks silly. "Unless you are writing your brief in longhand — and unless you believe the judges will alter your numbers — skip this "noxious habit."

10. Old habits die hard

The Judge is fully aware that old habits die hard. That is why he has cited an instant as a reminder to young lawyers:

"One caveat to young lawyers: change comes slowly to our profession. I once made the mistake of teaching legal drafting, and tried to convince the students to eschew legalisms and write plainly. Of course, one student immediately followed my advice and submitted a draft to a senior partner, who sent it back with instructions to make it more "lawyerlike," i.e., more unreadable."

11. Call a party simply by his name only

The Judge's advice to lawyers is not to name a party to a suit in such a manner as to make it difficult to identify the party concerned. You may describe any individual simply by his name only.

"Do not go through your whole brief calling parties 'Plaintiff-Appellant' and 'Defendant-Appellee' or the like. Appellant would be enough, but calling the parties by name is better— your client has a name." "If you are representing an individual, call your client 'Jones'; if a corporation, 'XYZ Corp'."

"A name is always easier for the reader than a procedural label— only lawyers would label people by their procedural status." "Naming the parties not only personalizes the case, but saves a great deal of space … And your brief will be so much more readable. Be sure to be consistent and not switch back and forth between 'appellant', 'Jones', and 'plaintiff'.

12. Skip the "hereinafter called."

The expression "hereinafter called" is seldom used in legal drafting now. It was commonly used in early years. We may describe a person 'Tan Kim Seng' by his surname 'Tan' only, and that is more than sufficient to identify the person concerned.

"It is not necessary — a parenthesis at most, but you don't always need even that — if you start calling the party 'Jones', we will understand."

A 'parenthesis' is a bracket. For example, Chua Hock Eng, owner of a piece of land, creates a charge in favour of XYZ bank. When preparing the charge documents, avoid using the old style of writing: Chua Hock Seng (hereinafter called "the Borrower") of the one part, and XYZ Bank (hereinafter called "the Bank ")" of the other part.

You may just simply state: Chua Hock Seng ("the Borrower") of the one part, and XYZ Bank ("the Bank")" of the other part.

When naming parties, try to avoid a scenario that may give rise to confusion. For instance, in a Deed of Trust, it would be advisable to name the beneficiary "Chong Wee Ling" by his surname "Chong", while you name the trustee as "the Trustee". It is highly confusing to describe the parties as "the Beneficiary" and "the Trustee". If you name the parties as 'beneficiary' and 'trustee', in the end it could be so confusing that you may lose track of who the 'beneficiary' is, and who the 'trustee' is.

13. "Edit, edit, edit, and edit again.

Lawyers must see to it that when preparing documents, it is advisable to double check them to remove all typos and bad grammar, etc. The Judge's advice is to refer to a dictionary of legal usage.

"Typos, bad grammar, and misplaced paragraphs (which were not such a problem before computers) simply take away from your argument."

"*Keep a copy of Bryan Garner's excellent book,* ***A Dictionary of Modern Legal Usage*** *at your side to answer grammar, syntax, and punctuation questions."*

14. Books on plain English

The learned judge has recommended a few reference books on plain English:

1. Garner, Bryan A., ***A Dictionary of Modern Legal Usage****, Second Edition* (Oxford, 1995).
2. Williams, Joseph M., *Style:* ***Ten Lessons in Clarity and Grace***, Fourth Edition (HarperCollins, 1994);
3. Gordon, Karen Elizabeth, ***The Deluxe Transitive Vampire*** (Pantheon, 1993);
4. Garner's smaller book, ***Elements of Legal Style*** (Oxford, 1991).
5. Rogers, Will, ***"The Lawyers Talking***," 28 July 1935, in ***Will Rogers' Weekly Archives*** 6:243-244 (Steven K. Graggert ed. 1982),

---

Arbitration versus mediation

What is arbitration?

Unlike open-court litigation, arbitration is confidential and tends to be speedier and more cost-efficient.

The cases are mainly in the areas of construction and engineering, maritime and shipping, and insurance.

Parties can appoint their own arbitrators or agree to have a third party appoint one. Arbitrators can be engineers, architects and experienced lawyers.

A common practice now in transnational business deals is to include a clause in the contract to refer disputes for arbitration.

Arbitration awards are binding and can be enforced in more than 120 countries under the New York Convention.

What is the difference between arbitration and mediation?

■ In arbitration, the arbitrator looks into the legal rights and wrongs of a dispute and makes a decision.

Once he reaches a decision, it is binding on parties whether they agree with it or not. There is usually a winning and a losing party.

It is like the way a court case is decided, except that the process is not open to the public.

■ In mediation, the mediator helps parties settle their disputes by a process of discussion and narrowing differences to arrive at an agreed solution.

He does not decide on the outcome of the dispute.

A successful mediation results in an agreement signed by the parties. Hence there is no winning or losing party.

(The Straits Times, 22-1-2010)

The use of plain English in Australian courts

by Yang Pei Keng

Introduction

Australia is one of the many countries which started to use plain English decades ago. Quite some years ago, the Australian courts started using plain English. For example, plain English is being used in the ***Uniform Civil Procedural Rules 1999*** ("the Australian Rules") which is akin to our Courts Rules**.**

The Australian Rules have done away with much of the legalese we normally use in our legal practice. Plain English makes reading and understanding of the provisions of statutes and legal documents easy for everyone. Even non-legally trained persons may find them easy to read and understand.

The Australian government feels that, as a government elected by the people, it should seriously look into the actual needs of the populace. The use of plain English across the country is one of the ways to meet the needs of the citizenry.

It encourages the use of plain English not only in the Rules or legal documents, but also in other spheres, such as social and economic spheres, or cultural and educational fields.

Some of the common examples of plain English used in the ***Australian Rules*** are listed below. One will discover the vast difference between the plain English used in the **Australian Rules** and the legal language appearing in our ***Rules of the High Court 1980*** ("RHC").

Our RHC are full of legal parlance, which only legal practitioners can understand. Even lawyers may find it difficult at times to understand some of the provisions of legislation because of the legal jargon used and the manner of drafting the provisions. Such unsatisfactory state of affairs could have been avoided if plain English were used in drafting them.

Below are some examples highlighting the difference between the provisions in our RHC and those in the **Australian Rules**:

1. **RHC**: These rules **shall come into force** on the **1st** June 1980.
   Australian Rules: These rules **commence** on **1** July 1999.
   [Note: Instead of using the words "shall come into force", one word "commence" only is used in plain English. The word "shall" is also omitted. The word 'shall' is of not much significance in this context.]

2. **RHC**: "*… these rules shall have effect in relation to all proceedings …*" [O 1 r 2]
   Australian Rules: "*… these rules apply to civil proceedings in the following courts …*"
   Note: Instead of the long expression "***shall have effect in relation to***" used in RHC, one simple word "**apply**" is used in the **Australian Rules**.

3. It is interesting to note the footnote in the Australian Rules. It clearly shows the exact time of expiry of the old Rules, and the time of commencement of the new Rules: "*The old rules expire at the end of 30 June 1999. The Rules will commence at the beginning of 1 July 1999.*"
   The underlined words make it clear that the old rules expired when 30 June 1999 was up, and the new **Rules** would start as soon as 1 July 1999 began. This serves to avoid ambiguity.

4. **Use "Dictionary" instead of "definitions"**
   RHC : Definitions (O 1 r 4) – *"In these rules, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, namely- "*
   The above verbiage is usually used when introducing 'definitions' in any of our legislation passed, including RHC. But in plain English, the word **'dictionary'** is used in place of 'definitions'. And the 'dictionary' is in the form of a schedule attached to the **Rules**.
   There is no 'definitions' clause in any Australian legislation, rules and regulations or any legal documents drafted in the recent years. Instead, "**dictionary**" in the form of an attached schedule is used:
   Australian Rules : ***Dictionary*** *- "The dictionary in schedule 4 defines terms used in these rules."*

5. **Use 'must' instead of 'shall'**
Australian Rules : "*If the parties to a proceeding change …, the change must reflect the state of the parties after the change*."
Note: The word **'must'** is used instead of **'shall**'. The word 'shall' may give rise to ambiguity. "Shall" has been interpreted to mean 'may' or 'must', depending on the circumstances. The use of '**must**' instead of '**shall**' serves to avoid such ambiguity.

6. **Use "Starting proceedings"**
RHC: *Mode of beginning civil proceedings* (O5 r1)
Australian Rules : *Starting proceedings*
Note: The 2 simple words '***starting proceedings***' in the Australian Rules replace the long-winded '*mode of beginning civil proceedings*'.
RHC: *Rule 6. "… civil proceedings in the High Court **may be begun by** … originating summons …."*
Australian Rules : *"A proceeding **starts when** the originating process is issued by the court."*
Note: "*starts when*" replaces "may be begun by".

7. **Use "extending or shortening time" instead of "extention of time" and "to abridge the period"**
RHC: " *Extension …. of time" (O3 r5)* –
The Court may, on such terms as it thinks just, by order extend or abridge *the period* within which …"
Australian Rules: "**Extend and shorten time" -**
*"The court may, at any time, **extend a time set** … the court may **shorten the time**."*
Note: The expression "extending time" is used instead of "extension of time "; and "shorten the time" is used instead of "abridge the period".

8. **Use "If the court considers appropriate" instead of "as it deems fit"**
Australian Rules: "*The court may make any other order the court considers appropriate*." r13(2)(c). *The court may – if it considers appropriate – order that … r14(2)(c)*
Note: The usual words used in RHC or other legislation are **'as it deems fit'.** But in plain English, the expression '**if the court considers appropriate'** is used.

9. **Use "Service outside jurisdiction" instead of "service out of the jurisdiction"**
RHC: ***Service out of the jurisdiction*** –
*"…principal cases in which **service of notice of writ out of the jurisdiction** is permissible."*
Aust*ralian Rules**: ***Service outside Australia –
*"An originating process for any of the following may be served on a person **outside Australia** without the court's leave." r.124(1)*
Note: In our RHC, "service out of the jurisdiction" is the legal parlance for service outside Malaysia [O.11]. The Plain English used in Australia Rules - **'service outside Australia'.** It is stripped of all legal jargon, simple and easy to understand.

10. **Use "a proceeding 'based' on a tort" instead of "a writ 'founded' on a tort"'**
RHC: "*… if **an action begun by a writ is 'founded' on a tort** committed within the jurisdiction…*
Australian Rules: " ***A proceeding based on a tort** committed within jurisdiction…"* Note: Instead of the words '**founded"** on a tort, a simpler word "**based"** on a tort is used.

11. **RHC**: *" 'scheduled territories' **has the meaning assigned to it by** the Exchange Control Act 1953."*
Australian Rules: *" 'partnership' **see** the Partnership Act 1891."*
Note: Instead of using the long expression "**has the meaning assigned to it by",** only 1 simple word "**see"** is used in plain English.

12. **RHC**: *"pleading" does not include a petition, summons or preliminary act;*
Australian Rules: *"pleading" means –*
for a plaintiff – a concise statement in a claim of the material facts on which the plaintiff relies; or
for a defendant – the defence stated in the notice of intention to defend or defence;
and includes a joinder of issue and affidavit ordered to stand as a pleading.

At a glance, anyone can understand what a 'pleading' is in the Australian Rules, but few can understand the definition of 'pleading' given in the RHC.

There are many more similar examples of plain English in the Australian Rules. For ease of reference, some of the more common examples are listed below:

1. *If the plaintiff intends to* ***act personally: r****17(1)(a)* [instead of "**act in person**"]
2. ***If the solicitor, or the solicitor's firm****, has an email address… R17(3)*
3. *A claim must be in* ***the approved form****. R22(1)* [instead of 'the *prescribed form"* commonly used in Malaysia]
4. *The plaintiff must ensure a claim has a* ***statement on it telling the defendant… r23***
5. *If the defendant* ***does not file*** *a notice of intention to defend… R23(b)*

[instead of "*fails to file*" in our RHC]

6. *A claim* **remains in force for 1 year** starting on the day it is filed. 24(1)
7. *The* ***court's leave*** *must be obtained. R24(4) [instead of "leave of the court"]*
8. ***Despite subrule (1),*** *a claim that is renewed is* ***taken to have started*** *on the day the claim was originally filed. R24(5) [Instead of "notwithstanding…" and "deemed to have commenced"]*
9. *Subrule (2)* ***does not apply*** *if these rules* ***or another law*** *authorises the hearing of the application without any notice being given to another person. R26(3)* [instead of "fails to apply" and "or any other legislation"]
10. *The application, and any copies of the application for service, must specify* ***the day set for hearing the application.r26(7)***
11. *An application must be filed* ***and then served*** *on each respondent at least* ***3 business days*** *before the day set for hearing the application. R27(1)*
12. *A person making the application must sign the application* ***and file it****. R32(1)*
13. *If the defendant… does no object, the court* ***cannot, on its own initiative,*** *decide that the proceeding should have been started in another district. r39(2). [Note: '****of its own initiative'*** *may also be used: see r48(2)]*
14. *However****, if there is doubt or difficulty about*** *how a proceeding to be started, the court, on application to it, may give directions. R53(2) [Instead of "in case of any doubt about…"]*
15. *A failure to comply with subrule (4)* ***does not invalidate*** *the process. R53(5)*
16. *The court must not* ***give leave*** *to proceed unless it is satisfied … r55(3). [Instead of "grant leave"]*
17. *… the court must not include or substitute a party* ***after the end of a limitation period*** *unless 1 of the following applies – r.69(2) [Note: 'the end' instead of 'the expiry']*
18. *The court may order that* ***2*** *or more proceedings be heard together or in a particular sequence. R.79*
19. *Two or more partners may start a proceeding in* ***the partnership name. r.83(1)***
20. *…a party* ***may by written notice require*** *the partnership to give the names and* ***places of residence*** *of the persons who were partners in the partnership… r.83(4) [Note: use 'by written notice' instead of 'by notice in writing']*
21. ***Litigation guardian*** (instead of "*Guardian ad litem"*)

In conclusion, I notice that there is some improvement in the drafting of the RHC, compared with the earlier version of court rules. But there is still room for improvement.

If the relevant authorities genuinely have the interests of the populace at heart, it is high time for them to seriously look into the use of plain language in drafting our legislation, and regard using plain language as a top priority in drafting any future legislation.

Even South Africa has taken steps to popularize the use of plain English quite some years ago. The relevant authorities must adopt an earnest and sincere attitude towards the use of plain English. Genuine efforts must be made towards this end, so as to keep pace with countries all over the world which have already been promoting the use of plain English for decades.