PLAIN LANGUAGE

Readable contracts (Part 2)

BY WAYNE SCHIESS

MY OWN RESEARCH

I contacted the authors of the article discussed in Part 1,[1] accessed a portion of the two corpora they used, and conducted my own assessments. My resulting corpus of contracts and my corpus of everyday written English both had more than a million words.

I assessed the text for average sentence length, Flesch Reading Ease, and Flesch–Kincaid Grade Level and also included those averages from my last ten columns on legal writing in my local bar magazine, *Austin Lawyer*:

	Average Sentence Length	Flesch Reading Ease	Flesch–Kincaid Grade Level
Everyday written language	17	56	9
Contract language	42	20	19
Schiess's last ten pieces	17	52	10

These results give us information we likely knew already and suggest why the original study's authors undertook their research in the first place. I'll say a bit more about these results here.

AVERAGE SENTENCE LENGTH

The average for the everyday English — 17 words — is short but typical: everyday-English sentences average 15 to 20 words. The 42-word average for the contracts is, well, huge. As I pointed out in Part 1, these are commercial contracts entered by sophisticated parties represented by counsel, so the long sentences aren't as troubling as they might be if the contracts were apartment leases, credit-card agreements, or car-insurance policies. But the 42-word average means that there are some really long sentences, and even experienced transactional lawyers might find reading those long sentences difficult.

FLESCH READING EASE SCORES

This formula, included in Microsoft Word, was finalized in 1948 by Rudolf Flesch (an Austrian lawyer who fled the Nazis in 1938 and earned a Ph.D. in education in the United States). It assesses the number of syllables and sentences per each 100 words and uses that assessment to produce a score from 0 to 100: 30 is difficult, and 60 is plain English.[2]

At 56, the everyday-English text comes close to Flesch's standard for plain English — as we'd expect. And as we might have predicted, the Flesch Reading Ease score for the contract language is, at 20, quite low — what Flesch labels "very difficult."[3] The long average sentence length doubtless contributes to this low score, but the average number of syllables per word surely does too.

One reminder about readability measures, and particularly the two mentioned here (above and below): a good score doesn't ensure that the writing will be clear and plain, but a poor score at least indicates that the writing is likely to be difficult.

FLESCH–KINCAID GRADE LEVELS

This scoring system was derived from the Flesch Reading Ease score by J.P. Kincaid[4] and reports the number of years of formal education that a reader needs in order to understand the text. My everyday-English corpus scored a 9, meaning that one who has completed the ninth grade should be able to read and understand it. My own writing — which is mostly *about* writing — tends to hover around the tenth-grade level.

The Flesch–Kincaid Grade Level for the contract language is high at 19, although I once read a decision from an administrative-hearing appeal that scored a 20. But grade-level 19 is, unsurprisingly, the equivalent of the reading level of a person with a high-school education (12), a college degree (16), and a law degree (19).

40 FORTY YEARS OF PLAIN LANGUAGE

"Plain Language," edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 40 years. To contribute an article, contact Prof. Kimble at Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/plainlanguage.

Thus, the grade level is appropriate given the context: these contracts were prepared by and for attorneys.

Recommendations. Still, the 42-word average sentence length is taxing at best and borders on impenetrable. Anything we can do to reduce that average will make a contract easier to read and understand and, therefore, easier to draft, easier to review, and easier to explain to the client. Often, the fixes are not too hard.

ARCHAIC LEGAL WORDS

Here I conclude with my comments on a few words found in my million-word corpus of commercial contracts. But first, I'll acknowledge reality.

Lawyers prepare commercial contracts by using forms and templates, and that saves time and money. It also provides some assurance — risk avoidance. Suppose the form contract has been used in 20 or 30 or 50 other transactions, all of which closed and were performed without litigation. By relying on that form, you probably avoid risk, reassuring yourself and your client that this transaction, too, will be performed without serious problems. So retaining and reusing forms can be a good practice, even if the forms use some archaic legalese.

But may I offer a few suggestions?

The following words are unnecessary because they have everyday equivalents, and some of them cause problems — albeit rarely — so I recommend deleting and replacing them. Parentheses show the number of appearances in the contracts corpus.

aforementioned (15), aforesaid (49)

The main problem with *aforementioned* is not that it's a multisyllabic monster; the problem is that it's vague. As I said of *aforementioned* in 2008: "Why use this outdated word when its shorter cousin, *aforesaid*, is available? I'm kidding. Eliminate them both and specify what you're referring to."[5] In addition, the meaning of *aforesaid* has had to be construed in reported appellate decisions at least five times.[6]

herein (1,093), hereinabove (7), hereinbefore (10), hereinafter (120)

Again, the problem is vagueness. As the legal-language expert David Mellinkoff put it, "Where? This sentence, this paragraph, this contract, this statute? *Herein* is the start of a treasure hunt rather than a helpful reference. The traditional additives are equally vague: *hereinabove* . . . *hereinbefore* . . . *hereinafter* . . . ."[7] And I'll add that *herein*'s meaning has been litigated in at least 11 reported cases.[8]

said (214)

When used as a demonstrative pronoun or "pointing word," *said* adds no precision, only a legalistic tone. As the contract-drafting expert Tina Stark says, "*Said* and *such* are pointing words. They refer to something previously stated. Replace them with *the*, *a*, *that*, or *those*."[9] So if the phrase "that party" is vague, changing it to "said party" won't clear it up. And *said*'s meaning has been litigated at least 30 times.[10]

whereas (224)

This word appears in the formal, archaic recitals that proceed with a series of paragraphs beginning with "WHEREAS" and conclude with "NOW, THEREFORE . . ." But Kenneth Adams, a leading expert on contract language, doesn't like *whereas*: "The recitals tell a story. They're the one part of a contract that calls for straightforward narrative prose. Don't begin each recital with *whereas*, although that's the traditional option. This meaning of *whereas* — 'in view of the fact that; seeing that' — is archaic, and the repetition is inane."[11]

witnesseth (21)

At first, I found only 8 occurrences of *witnesseth* in the contracts corpus, and I was surprised but happy to think that its use was declining. Then I searched for it with a space after each letter — W I T N E S S E T H — and found 13 more. I think it needs to go, and the legal-language expert Bryan Garner agrees: "This archaism is a traditional but worthless flourish. . . . There's absolutely no reason to retain *witnesseth*. It's best deleted in modern contracts."[12]

Ultimately, retaining these words is probably harmless, but removing them is too. And your contracts will be much less musty.

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ENDNOTES

1. Martinez, Mollica & Gibson, *Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language*, 224 Cognition 105070 (2022) <https://doi.org/10.1016/j.cognition.2022.105070> [perma.cc/XBW7-25E7] (all websites accessed June 11, 2024).
2. DuBay, *Smart Language: Readers, Readability, and the Grading of Text* (BookSurge Pub, 2007), p 56; Flesch, *How to Write Plain English* (Harper Collins,1979), p 25.
3. Flesch at 25.
4. DuBay at 90–91.
5. Schiess, *Ten Legal Words We Can Do Without*, Austin Lawyer (May 2008), p 6 <https://law.utexas.edu/faculty/wschiess/legalwriting/2008/06/ten-legal-words-and-phrases-we-can-do.html> [perma.cc/4TMC-37TC].
6. 2D *Words & Phrases* (2020), p 294.
7. Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage* (West Pub Co, 1992),

p 283.
8. 19A *Words & Phrases* (2007 & Supp 2021), pp 36–37.
9. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed, Aspen Pub, 2014), p 257.
10. 38 *Words & Phrases* (2002 & Supp 2021), pp 29–31.
11. Adams, *A Manual of Style for Contract Drafting* (5th ed, ABA, 2023), p 35.
12. Garner, *Garner's Guidelines for Drafting & Editing Contracts* (West Academic, 2019), p 454.

THE CONTEST WINNER

In May, I revived a feature that had not appeared in the column for some years: a redrafting contest. I asked readers to redraft the following, Federal Rule of Evidence 104(c) before the Evidence Rules were "restyled" more than a decade ago:

> Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

I suggested that participants start with the active voice by naming a subject and also use a three-item vertical list. Here's the current (restyled) rule:

> The court must conduct a hearing on a preliminary question so that a jury cannot hear it if:
> 1. the hearing involves the admissibility of a confession;
> 2. a defendant in a criminal case is a witness and so requests; or
> 3. justice so requires.

The one submission that I rated an "A" was from David Fordyce, now retired, who was a sole practitioner and then chief in-house counsel for Burrough's, Inc. (I've added a couple of edits in brackets):

> The court will [must] conduct a hearing on preliminary matters outside the presence of the jury [outside the jury's presence] when:
> 1. the matter concerns the admissibility of a confession;
> 2. the accused party is a witness and so requests; or
> 3. the interests of justice ~~otherwise~~ so require.

He receives a copy of my book *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (new 2d edition). Congratulations!

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