Plain Language for Real-Estate Lawyers:
Simple Principles To Achieve Clarity and Please Clients

By William J. Maffucci, J.D.*

The "Plain Language" movement is not new. It dates back at least to the middle of the nineteenth century, long before the 1935 publication of William Strunk's *The Elements of Style*. I am a recent convert, but, with a convert's zeal, I have plunged headlong into the Plain Language literature.

It wasn't hard to find Plain Language treatises prepared specifically for lawyers. Some of the most influential Plain Language manifestos are written for lawyers: Richard Wydick's *Plain English for Lawyers*, Joseph Kimble's *Lifting the Fog of Legalese*, Bryan Garner's *Legal Writing in Plain English*, and Garner's *The Elements of Legal Style*.

But I have found nothing in the literature prepared specifically for real-estate lawyers, who face special drafting challenges. So I have taken the first step, compiling here a list of the Plain Language principles that have the greatest application to real-estate drafting.

You might detect a contrarian theme in the pages that follow. Although I am a zealot, I am not a purist. Far from it, some Plain Language purists would call me a heretic. Why? Because I don't believe that all "legalese" and old-fashioned drafting conventions must be avoided (when drafting) or revised (when editing). I allow exceptions, for three reasons:

- Sometimes legalese is substantively correct and sufficiently clear. Irksome, yes, but neither erroneous nor unclear.

- Sometimes even the most experienced lawyers are uncertain as to whether a term or a form that has been used since time immemorial can, in fact, be deleted or modernized without substantive consequence.

- Plain Language drafting — and, more so, redrafting — takes a lot of time. Lawyers don't always have that time, and their clients don't always have the patience for it, let alone the willingness to pay for it.

So call me a realistic zealot. I seize every opportunity to use Plain Language when it does the job and when I think that my clients will pay for the additional time that it might require. And I confess that other times I will do it, even if I know I'll have to eat the time, just because I want to proselytize.

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Principles

1. Have compassion for your readers.

This Indenture *W I T N E S S E T H* that real-estate lawyers who cling to drafting archaisms have little compassion for their readers.

The problem persists because many lawyers don't know whether using words such as "indenture" and "witnesseth" is obligatory (or even prudent) in the documents they are asked to draft. They know only that the words are customary. But regardless of why lawyers started using those words centuries ago, they — the words, not the lawyers — are usually just relics today.

Likewise lawyers drafting affidavits often end them with some version of this statement: "Further affiant sayeth naught." They do that to indicate that there are no more substantive averments in the affidavit. But there are simpler ways to prevent any confusion about where the substantive portion of an affidavit ends. In most cases the position of the signature and of the notary's seal beside it suffices. And it's hard to justify ever using "sayeth," a word that doesn't appear in **Black's Law Dictionary**[1] — or, for that matter, in dictionaries of broader scope.[2]

Compassionate legal writing avoids not just archaic terms but also the cumbersome drafting conventions that transactional lawyers often employ. One convention is common when lawyers draft generic agreements from scratch: They begin the agreement with a single run-on sentence that encompasses the introductory paragraph (which identifies the parties and might provide other preliminary detail), continues with the word "witnesseth" (usually with a typographical feature to highlight it), and then wends through a series of factual recitals that are set forth in separate paragraphs that each begin with the word "whereas" and are separated with semicolons.

Like this:

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[1] **Black's Law Dictionary** has been revamped and vastly improved by Bryan A. Garner, its editor-in-chief. He is a Plain Language champion who is considered by many (including me) to be the leading authority on usage in American English. Founder of LawProse, Inc. (www.lawprose.org), his works and projects extend far beyond the **Black's** revision and the classics noted earlier. He also writes *Garner's Usage Type of the Day*, a delightful listserv published by Oxford University Press (http://www.us.oup.com/us/subscriptions/subscribe/?view=usa). He has even collaborated on a project that, I submit (with only slight exaggeration), is his most remarkable: **The Rules of Golf in Plain English**.

[2] I've even been unable to find "sayeth" in Scrabble™ dictionaries, which are positively promiscuous.

SETTLEMENT AGREEMENT

This agreement ("Settlement Agreement"), dated October 18, 2012, by and among the KARA KENT ("Kara"), a natural person with an address of 100 Aspen Lane, Philadelphia, Pennsylvania 19101, JONATHAN KENT ("Jonathan"), a natural person with an address of 200 Kansas Street, Philadelphia, Pennsylvania 19102, MARTHA KENT ("Martha**")**, a natural person with an address of 200 Kansas Street, Philadelphia, Pennsylvania 19102, and CLARK J. KENT ("Clark") , a natural person who lives at 300 Fortress Avenue, Philadelphia, Pennsylvania 19103,

W I T N E S S E T H:

WHEREAS, Kara, Jonathan, and Clark (collectively, "Kent Siblings") are siblings; and

WHEREAS, Jonathan and Martha are married; and

WHEREAS, Lara J. Lorvan ("Lara"), who is now deceased, was the mother of all of the Kent Siblings; and

WHEREAS, Lara owned in in fee simple that certain real property ("Kansas Street Property") located at 200 Kansas Street in Philadelphia, Pennsylvania and identified by the Board of Revision of Taxes as Parcel Number 00-06-00001; and

WHEREAS, Lara survived her husband; and

WHEREAS, Lara remained a widow, never remarrying, until her death; and

WHEREAS, Lara died intestate; and

WHEREAS, with Lara's death title to the Kansas Street Property passed to the Kent Siblings as tenants-in-common; and

WHEREAS, disputes have arisen among Kara, Jonathan, Martha, and Clark about the use, ownership, and maintenance of the Kansas Street Property; and

WHEREAS, Kara, Jonathan, Martha, and Clark desire to resolve the aforesaid disputes.

In plain English, the document might look like this:

SETTLEMENT AGREEMENT

This is an agreement ("Settlement Agreement"), dated October 18, 2010, among KARA KENT ("Kara"), who lives at 100 Aspen Lane, Philadelphia, Pennsylvania 19101, JONATHAN KENT ("Jonathan") and Jonathan's wife, MARTHA KENT ("Martha"), who live at 200 Kansas Street, Philadelphia, Pennsylvania 19102, and CLARK J. KENT ("Clark"), who lives at 300 Fortress Avenue, Philadelphia, Pennsylvania 19103.

Background

Kara, Jonathan, and Clark are siblings ("Clark Siblings"). Their mother, Lara Lorvan ("Lara"), is now deceased. Immediately before she died, she owned in fee simple certain real property ("Kansas Street Property") located at 200 Kansas Street in Philadelphia, Pennsylvania and identified by the Board of Revision of Taxes as Parcel Number 00-06-00001. She had survived her husband, and she died without having remarried. She died intestate, so title to the Kansas Street passed to the Clark Siblings.

After Lara's death disputes arose among Kara, Jonathan, Martha, and Clark about the use, ownership, and maintenance of the Kansas Street Property. They have entered this Settlement Agreement to resolve those disputes.

2. Be natural.

Some authorities recommend that legal writing mimic ordinary spoken language. I disagree. I think it should mimic extraordinary spoken language — the words of that rare speaker who speaks precisely and conveys ideas in perfect substantive succession.

But I agree that most legal writing can be improved by mimicking the habits of the spoken word. Even formal speakers will use contractions, for instance. And sentence fragments. And sentences — even those introducing new paragraphs — that begin with "And" or "But" rather than "Moreover" or "However."[3]

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[3] Most people speak in the first person. Should a lawyer write that way? Not often; most legal writing requires a more objective tone. I think I can get away with it in these materials, because they are largely testimonial (I'm sharing my experiences) and subjective (I'm indicating what I like). But I don't push the envelope in many other contexts.

Using the natural tools of the spoken word will put you in very good company. As Bryan Garner notes, the most respected journalists start sentences with "And" and "But." So do those state and federal judges who have distinguished themselves by the clarity of their writing.

Using a natural tone is particularly important for documents that a lawyer is ghostwriting for a client. Here's a letter ghostwritten by a lawyer who made no effort to sound like a layperson:

> Dear Ms. Black:
>
> I am the holder in fee simple of the tract of real property located at and known as 198 Kansas Street in Philadelphia, Pennsylvania, and identified by the Board of Revision of Taxes of Philadelphia, Pennsylvania, as Parcel No. 00-06-0001. I acquired my title by deed dated July 22, 1958, from Alfred G. Spencer and Arlene Harris-Spencer, his wife, which was recorded on July 24, 1958, with the Department of Records of the County of Philadelphia, in Deed Book FHS 256 at Page 315 et seq.
>
> A review of the land records revealed that by deed dated October 18, 2012, and recorded on October 22, 2012, with the Department of Records of the County of Philadelphia as Document 2448267, you acquired that certain tract of real property located and known as 200 Kansas Street in Philadelphia, Pennsylvania and identified by the Board of Revision of Taxes as Parcel Number 00-06-0000.
>
> Your tract of real property adjoins my tract of real property, identified as aforesaid, the common border dividing my land to the north and northeast and your land to the south and southwest.
>
> Visual inspection reveals that sometime on or after October 18, 2012, and before or on November 16, 2012, you or someone acting on your behalf erected or caused to be erected and permanently affixed to the land what appears to be a division fence that roughly follows the path of aforesaid common boundary. Further inspection and consultation with a professional surveyor revealed and confirmed that the aforesaid fence was actually constructed on my land at distances of between 17 and 23.7 feet north and northeast of the boundary.
>
> I recognize that the expense you incurred constructing the fence must have been substantial and that you would likely incur commensurate expense having it removed and relocated on

your property. And yet I have the right to demand that you do precisely that, and caution compels me to reserve that right.

Notwithstanding and without limiting the aforesaid right, I wish to foster neighborly relations with you. I have no immediate need for the portion of my land between the location of the fence and the actual boundary. Accordingly, I send this letter as formal notice that I have granted you permission to use that portion (but only that portion) of my land.

Please be advised that I might withdraw my permission at any time, for any reason, without any advance notice to you. Please be advised further that your use of the affected portion of my land is absolutely at your own risk, that I make no representations or warranties whatsoever about the land, including but not limited to representations or warranties as to the quality of the land, the existence vel non of dangerous conditions upon the land, conditions of the land, or the fitness of the land for any particular purpose.

By using my land, you agree to release me, indemnify me, and hold me harmless . . . .

Rewriting the letter in an informal tone and without all the extraneous legal detail would not only make it easier to read but also might decrease the likelihood that the recipient will get suspicious and feel compelled to engage counsel.

Dear Ms. Black:

Welcome to the neighborhood! I own Blueacre, right next to your property. (My property is immediately north and slightly east of yours.) I hope we become good friends.

I see that you put up a fence. I've taken a look at your deed and mine (copies enclosed), and I've discovered that your contractor put the fence in the wrong place. The actual boundary is about 20 feet closer to your home.

I know it's an expensive fence, and I'd hate to make you incur the expense of having to move it if it isn't in my way. And at the moment I have no plans to use the area you've cut off.

So I'm not writing to complain or to make any demand that you move the fence immediately. I'm just dropping this note to assure you that, for the time being at least, you have my permission to use the portion of my yard that is cut off by your

fence. Just maintain it and leave the landscaping as it is, more or less, now.

3. Omit needless words.

Although this is a paramount principle, it begs the question: Needed for what? The answer often isn't easy.

- A repeated word is not always needless; it is sometimes needed for emphasis. Strunk himself provided proof of this point in the way he articulated this rule: He would repeat it three times, with increasing vigor: "Omit needless words. Omit needless words! *Omit needless words!*"

- Sometimes the need is nothing more than certainty that a statement is unambiguous. It is hard, at first, to dispense with many of the words with which lawyers pad their prose for that comfort. But with practice lawyers can improve their ability to recognize extraneous words and gain confidence in their ability to omit them without consequence.

- Sometimes additional words are needed for rhetorical flourish. Abraham Lincoln could have saved three words by writing "Eighty-seven," but that word would not have resonated nearly as much as have his "Four score and seven."

- Sometimes words that seem superfluous actually serve specific legal functions. These are often the hardest to recognize, because they are not self-evident.

Consider this passage, versions of which typically follow the recitals of an agreement (such as the agreement used to illustrate Principle 1 above) and precede the enumerated terms:

> And now, therefore, in consideration of the foregoing, of the reciprocal rights and obligations set forth below, and of other good and valuable consideration, the receipt of which and the sufficiency of which (as consideration) the parties hereto each acknowledge, the parties hereto, intending to be legally bound, all agree as follows:

How much of it is needless? One could argue that all of it is. As a matter of fact, in most instances the entire passage could be eliminated without substantive consequence. But before discarding it, try to determine the purposes (needs) that the passage serves. I can think of four:

- The passage reflects the writer's familiarity with drafting conventions of transactional lawyers. That might increase the other parties' comfort with the document.

- The passage enables the text to segue from the recitals to the terms of an agreement.

- The passage acknowledges that there is consideration for the agreement and that the parties consider the consideration to be adequate.

- The passage fulfills a legal function (at least in Pennsylvania) that is not self-evident: It makes the issue of consideration irrelevant, as contemplated by the Uniform Written Obligations Act, 33 Pa. Stat. § 6: A promise is not rendered invalid for lack of consideration if it contains an "express statement, in any form of language, that the signer intends to be legally bound."

Should a writer preserve every word or passage that serves any recognized purpose? Certainly not. Brevity enhances clarity, and language should be avoided when the "need" it serves is not truly "necessary."

Eighty percent of the language quoted above seeks only to preclude any argument that the agreement that follows is unenforceable for lack of consideration. Sometimes it's necessary to do that, again and again, with belt and suspenders and Velcro and safety pins. But usually it's not.

4. Use familiar words, which are usually short.

A good vocabulary should be a source of pride, not shame. The writer shouldn't show it off, of course. But if the writer happens to know the *mot juste* (the word or phrase that perfectly expresses a concept), the writer should not fail to use it out of fear that the reader might not understand it. If that fear is substantial, the writer can explain the word (parenthetically or otherwise).

Why, then, do Plain Language advocates insist that writers use short and familiar words? Because writers must constantly choose from two or more words that are truly synonymous, in which case choosing the word that is shorter or more familiar doesn't compromise meaning.

I will never again use ***exordium*** to refer to the introductory paragraph of an agreement, immediately below the title and before the recitals, because ***first paragraph*** or ***preface*** will suffice. But until I find a simpler way to refer to the section of a deed that customarily begins ***TO HAVE AND TO HOLD*** and customarily ends immediately before the paragraph that introduces the parties' signatures, I will continue to call it the ***habendum***.

It is often difficult to know whether a word is truly synonymous with a more familiar word. And real-estate lawyers struggle more than most, particularly when drafting documents of conveyance.

Consider the warranty provision in a special-warranty deed:

> AND GRANTORS, for themselves, their heirs, executors and administrators, do covenant, promise, and agree, to and with the said Grantee, his heirs and assigns, by these presents, that they, the said Grantors and their heirs, all and singular the hereditaments and premises hereby granted or mentioned and intended so to be, with the appurtenances, unto the said Grantee, his heirs and assigns, against them, the said Grantors and their heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same or any part thereof, by, from or under him, her, them or any of them, shall and will, Subject as aforesaid, WARRANT and forever DEFEND.

Few people who are not lawyers ever encounter the words "hereditaments" and "appurtenances" — other than in a deed (or a will). When they do, they might not have a lawyer to consult, and many of the lawyers they might consult would have only a vague sense of what the words mean.

Knowing this, should a lawyer asked to draft a deed avoid the words "hereditaments" and "appurtenances" altogether? Are they truly synonymous with words that are familiar with most laypersons?

The answer used to be no. Almost every word of the common forms of deed available from legal stationers "has had years of judicial interpretation and has acquired an exact meaning well known to the legal profession." **Ladner Pennsylvania Real Estate Law** (5th ed.) § 16.04, at 16-7.

The answer might still be no. I'm not going to research the issue, because the legislature has made it moot. As long as a deed's language of conveyance includes the word "grant" or "convey" (and in my thirty years as a real-estate lawyer I've never seen one that didn't), and as long as the deed contains no express limitation to the contrary, the deed passes all of the grantor's "hereditaments[] and appurtenances." 21 Pa. Stat. §§ 2-3 The same principle applies to a covenant of warranty: If the warranty encompasses everything that the warrantor granted and conveyed, it covers the "hereditaments and appurtenances" regardless of whether those words appear.

But what if all of the other lawyers insist upon using the customary language (quoted above) for the covenant of special warranty? You might suggest that they show some compassion for their clients — and for the future generations who might review the deed in the land records — by adding a parenthetical that explains the "special warranty" in plain English:

> This paragraph, which uses words that have long been customary in Pennsylvania deeds, is called the special warranty. It means that (i) Grantors warrant to Grantee that, immediately before signing this Deed, Grantors owned the Property and had the power to convey it to Grantee and (ii) Grantors further promise that they will defend Grantee from any contrary claims of title that anyone in the world might make by, from, or under Grantors, or one of them. "By, from, or under" Grantors means as a result of Grantors' ownership of the Property or as a result of actions taken by Grantors as owners of the Property.

The other attorneys might protest that they've never seen anything like that in a deed, and your client might not want to pay you for trying to make them comfortable with it. It's not worth killing the deal or trying your client's patience. But if you're a true Plain Language convert, you'll take some satisfaction in not having passed up an opportunity to proselytize.

5. Prefer short sentences.

Good prose is like a gourmet multicourse dinner. To digest it properly, readers must be allowed to pace themselves. They don't want to be rushed, and they don't want to be overwhelmed. They want the courses to be presented orderly, artfully, and in manageable portions.

Nothing spoils a reader's appetite more quickly than long sentences served one after the other, with no respite. Readers quickly lose focus, struggling to keep up with the writer, and eventually give up in despair, disgust, or disinterest.

Legal writing is laden with particularly long sentences. Wydick notes that overly long sentences are common in statutes and regulations; they "grind on, line after line, perhaps on the theory that if the readers come to a period they will rush out to violate the law without bothering to read to the end."

How about real-estate lawyers? We needn't look far to realize that we're among the worst offenders, especially when we draft instruments of conveyance. Here's a single-sentence recital in a standard form mortgage that appeared as Form 72 in the Fourth Edition of **Ladner Pennsylvania Real Estate Law**:

> WHEREAS, the said Mortgagor, in and by a certain Obligation or Writing, obligatory under his hand and seal duly executed, bearing even date herewith, stands firmly bound unto the said Mortgagee in the sum of Twenty-eight Thousand Two Hundred and 00/100 ($28,200) Dollars, lawful money of the United States of America, conditioned to keep and maintain at all times, until the full discharge of the said Obligation, a fire policy or policies of

> insurance with extended coverage in good and approved company or companies, duly assigned as collateral security to the Mortgagee or his Executors, Administrators or Assigns, to an amount not less than Fourteen Thousand One Hundred and 00/100 ($14,100.00) Dollars upon the buildings on the premises hereinafter described, and conditioned for the payment of the just sum of Fourteen Thousand One Hundred and 00/100 ($14,100.00) Dollars, lawful money as aforesaid, within thirty (30) years after date hereof, in monthly installments of not less than Ninety-three and 91/100 ($93.91) Dollars each, the first installment to be paid on the first day of July, 1975, and on the first day of each month thereafter, Together with interest thereon, payable monthly at the rate of seven (7%) percent per annum, on the unpaid balance of principal, without any fraud or further delay; and for the production to the said Mortgagee, his Executors, Administrators or Assigns, on or before the First day of July of each and every year of receipts for all taxes and water rent and sewer rent of the current year assessed upon the mortgaged premises, and shall keep and maintain said mortgaged premises in good condition and repair.

How long should sentences be? The answer depends upon the type of document, but Wydick and Garner offer rules of thumb. Wydick recommends an average sentence length of 25 words, with most sentences limited to one main thought. Garner recommends an average length of approximately 20 words. Here's a redraft of the language above that complies with that standard:

> The Mortgagor is indebted to the Mortgagee. The terms of the Mortgagor's obligations are set forth in a promissory note, having the same date as this Mortgage, in the original amount of Fourteen Thousand One Hundred Dollars ($14,100). The promissory note specifies that interest on that debt accrues at the rate of seven percent (7%) per annum. To secure Mortgagor's repayment of that debt to Mortgagee, Mortgagor has agreed to mortgage to Mortgagee the real property described below.

Opposing counsel might object that the revision omits much of the detail in the draft. And it does. If that detail appeared nowhere else in the mortgage-loan documents, some if not most of the detail should probably be reinserted elsewhere in the mortgage or the promissory note. But chances are all of the critical details appear elsewhere.

Opposing counsel might then point out that the original form referred two amounts: $14,100 and $28,200, while the plain English revision refers only to the lower amount. And the higher amount might not appear elsewhere in the mortgage-loan documents. If so, how can we justify removing reference to the higher amount here? The answer is that we can omit reference to the higher debt because it is not a critical detail. It's an historical detail: It is the "penal sum." Used for centuries (perhaps to impress upon the mortgagor the solemnity of the

contract), penal sums were customarily set at twice the original principal debt. They still appear occasionally, such as in mortgages drafted with old forms sold by legal stationers. But I would argue that including a penal sum is not only unnecessary but confusing when, as with the example above, the total of the payments that the mortgagor will make (7% over thirty years) substantially exceeds 200% of the initial principal debt.

6. Use longer sentences, too — but sparingly.

All Plain Language advocates warn that writing with no long sentences at all quickly becomes monotonous. They not only permit long sentences but require them, albeit in moderation, in any document that is longer than a few paragraphs.

Longer sentences can serve another purpose: They can make the overall document more concise. That's no paradox; it's simply a consequence of the fact that each new sentence has its own set of grammatical prerequisites — subject, verb, object, etc. Longer sentences can relieve the burden of repeatedly assembling a new set before the prior one has exhausted its useful life.

Strunk and his disciple E.B. White, who wrote successive editions of *The Elements of Style*, illustrate this point by contrasting two paragraphs:

> Encouraged by his wife, Macbeth achieved his ambition and realized the prediction of the witches by murdering Duncan and becoming king of Scotland in his place.
>
> Macbeth was very ambitious. This led him to wish to become king of Scotland. The witches told him that this wish of his would come true. The king of Scotland at this time was Duncan. Encouraged by his wife, Macbeth murdered Duncan. He was thus enabled to succeed Duncan as King.

The first is a single sentence of 26 words. The second, which adds nothing essential, spans 51 words, many of them necessitated solely by the writer's decision to use shorter sentences.

We can illustrate the same point by comparing the following two paragraphs, which hit closer to home.

> Buyer must deliver timely proof of Buyer's fulfillment of the financing contingency described immediately above. If Buyer doesn't, Seller must decide either to terminate this Agreement (effective as of the end of the Initial Contingency Period) or to postpone the Settlement Date for a period (determined by Seller in its sole discretion) no longer than 150 days. Seller must provide Buyer with written notice of Seller's decision no later than the close of the fifth business day following the end of the Initial

> Contingency Period. If Buyer does not receive timely written notice of Seller's decision to postpone the Settlement Date, Seller will be deemed conclusively to have elected to terminate this Agreement.
>
> < as opposed to >
>
> Buyer must deliver timely proof of Buyer's fulfillment of the financing contingency described immediately above. If Buyer does not deliver that proof, Seller must make a decision: Seller may decide to terminate this Agreement, or Seller may decide to postpone the Settlement Date. If Seller decides to terminate this Agreement, the termination will take effect as of the end of the Initial Contingency Period. If Seller decides to postpone the Settlement Date, Seller must also decide the length of the postponement. Seller may use Seller's discretion in deciding the length of the postponement, but the postponement must not be longer than 150 days. Whatever Seller decides, Seller must provide notice of Seller's decision to Buyer. Seller must deliver that notice within five business days following the end of the Initial Contingency Period. That notice must specify the length of the postponement. If Seller does not deliver any timely notice of Seller's decision, Seller will be deemed conclusively to have terminated this Agreement.

The first is at least as clear as the latter, and its longer sentences (averaging 28 words rather than 18) result in a space saving of about 30%.

7. Prefer short paragraphs.

This is mostly a mercy rule. Long paragraphs are daunting. But, as with short sentences, overuse of short paragraphs can lead to monotony. It can also give the reader the impression that the writer cannot give any particular point the attention it deserves.

Garner recommends "an average paragraph of no more than 150 words — preferably far fewer — in three to eight sentences."

8. Avoid "legalese": The peculiar words and terms that lawyers have historically used but that add nothing that cannot be accomplished with plain English.

Any concept that lawyers have customarily expressed with their irksome vernacular can be expressed just as clearly, and sometimes more clearly, with plain English. In most cases the plain-English equivalents of "legalese" are obvious immediately. Even when discerning them takes a few minutes (or more), the time is usually well spent.

Avoiding legalese is particularly appropriate in original drafting. It is also appropriate when adapting a template or editing another person's draft. But some documents are so laden with legalese that replacing all of it with plain English can become daunting for the lawyer and expensive for the client. When that happens, a lawyer can be excused for ignoring some or most of it and focusing only on the terms that terms or phrases that are likely to create confusion or ambiguity.

A Plain Language purist might respond that words such as *aforesaid*, *hereinafter*, *herewith*, and *herein* can themselves be ambiguous. That's true; they can be. But often they're innocuous; they do the job, and they don't confuse anyone. When that happens, no client will fault a lawyer for resisting the urge to replace the legalese with plain English, and no lawyer who gives in to that urge should expect a client to pay for it.

9. Use English whenever possible, because there are usually adequate English counterparts to foreign terms. If you feel compelled to use a foreign term that is not commonly used in ordinary speech, define it in plain English.

Some foreign terms, such as ***quid pro quo***, are familiar to most educated readers, including those with no legal training. Feel free to use them unless you're worried that your particular audience is unlikely to have encountered them.

Other foreign terms and expressions, such as ***ipso jure*** and ***sub suo periculo***, are less familiar to nonlawyers and offer no advantage over their straightforward English translations. Use the latter.

Sometimes foreign terms, such as ***res ipsa loquitur*** and ***habeas corpus***, convey much more than any English translation using as few or nearly as few words. Use them, but then explain them in plain English — unless you're certain that your audience will understand them.

10. Avoid redundant legal phrases, such as *cease and desist*. Pare them to their essentials, or substitute even simpler terms, such as *stop*.

Violations of this principle are rampant, and it's helpful to understand why. Many of them are habits inherited from the "times when a scrivener or conveyancer was paid according to the number of words he wrote, and mere prolixity had its own reward." **Ladner Pennsylvania Real Estate Law** § 16.08 (5th ed.). But the English-speaking lawyers who first compiled phrases such as ***grant and convey, bargain and sell, release and confirm*** had other incentives to pile it on.

English is a huge language, with vastly disparate roots (Latin, Greek, Anglo-Saxon). Wydick points out that in past centuries English lawyers had to ensure that their written work was understood by both the common folk (who spoke Old English or Middle English) and by the courts (which used Latin or Old French). Combining words that would be understood in each context was essential, so lawyers combined the counterpart expressions from each root. ***Free and clear***, for instance, derives from the Old English ***freo*** and the Old French ***cler***.

It was not always clear that counterpart words from disparate legal roots were completely synonymous. Combining them was a simple way to ensure that no nuance was overlooked. The redundancy (the extent to which the counterparts overlapped) was a small price to pay for peace of mind.

Over time, court interpretations and statutes established that many of the historical phrases and terms could be pared down without substantive effect. The legislature has declared, for instance, that the words "grant and convey" are sufficient for a deed of conveyance, 23 Pa. Stat. § 1, and that "release and quit claim" is sufficient for a quitclaim instrument, 23 Pa. Stat. § 7. But no comprehensive survey of those decisions and statutes exists, and — with or without such a survey — it will be many years before the shorthand terms supplant their prolix counterparts.

Until then, I advocate patience with the lawyer who does not yet know whether ***null*** would be adequate, without ***and void and of no further force or effect whatsoever***. Most lawyers are busy, and they cannot afford to spend the — largely unbillable — time to assure that every document is drafted without redundancy.

11. Use the active voice unless the passive voice would serve a special purpose.

This principle is prominent in the Plain Language literature. It also appears in statutory or regulatory prescriptions of plain English, such as Pennsylvania's Plain Language Consumer Contract Act. (The act is 73 Pa. Stat. §§ 2201-2212. The principle is § 2205(b)(2).) One could argue that this principle combats bad writing generally, not "unplain" language specifically. But its importance as a general principle must not be understated.

Plain Language advocates recognize, however, that the passive voice should not simply be abandoned. Sometimes it serves important purposes:

- It can redirect the reader's attention, when appropriate, away from the subject of a sentence, such as when the subject is unknown or when identifying the subject is unimportant. ***The notice was received on a weekday.*** | ***The default was not timely declared.***

- It can create what Wydick calls "detached abstraction." ***In the eyes of the law, all persons are created equal.***

- It can be used to modify syntax for dramatic effect or emphasis. ***The lawyer was arrested within seconds after arriving for the closing.***

- It can enable the writer to avoid using a pronoun that is gratuitously sex-specific. A lawyer who specifies that ***the automobile of the first registrant may be parked on the street*** need not presume that the first registrant will be male or female.

12. Keep subjects close to their verbs, and verbs close to their objects.

A standard deed warranty illustrates in gruesome detail the consequences of allowing verbs to become unmoored and float far from their subjects and objects:

> AND the said Grantors, for themselves, their heirs, executors and administrators, do covenant, promise, and agree, to and with the said Grantee, his heirs and assigns, by these presents, that they, the said Grantors and their heirs, all and singular the hereditaments and premises hereby granted or mentioned and intended so to be, with the appurtenances, unto the said Grantee, his heirs and assigns, against them, the said Grantors and their heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same or any part thereof, by, from or under him, her, them or any of them, shall and will, Subject as aforesaid, WARRANT and forever DEFEND.

Can we simply rewrite standard conveyancing paragraphs, like this one, that have been used and interpreted by courts for centuries? A Plain Language purist would insist that, yes, we can. I won't go that far — at least not without reading every interpretive decision that has ever come down with regard to the provision at issue (which, I am sure, I will never do). But I'll go halfway: If I am drafting a document for a client who is not likely to understand the historical language, I'll use the historical language, but I'll then add a paragraph — right in the document — explaining the historical language. I provided an example, above, at the end of the discussion of Principle 4 (describing the purpose of a "special warranty" in a deed).

13. Avoid sentences with multiple negatives, exceptions to exceptions, or conditions to conditions. If it is impractical to avoid them entirely, use a list or tabulation, or both, to distinguish between levels of condition or detail.

Negative terms are easy to spot when they start with ***not*** or the prefixes ***un-*** or ***non-***. But words that operate negatively come in all forms: verbs (***void*** | ***except*** | ***negate*** | ***invalidate*** | ***terminate*** | ***undo*** | ***rescind*** | ***deny***), participles (***voided*** | ***excepted*** | ***negated*** | ***terminated*** | ***rescinded*** | ***denied***), nouns (***void*** | ***exception*** | ***negation*** | ***invalidation*** | ***rescission*** | ***denial***), adjectives (***void*** | ***null***) or, especially, prepositions (***except*** | ***unless*** | ***but*** | ***other than*** | ***instead of***). Writers must be vigilant identifying all of them.

One way to reform sentences with multiple negatives is to pair as many of them as possible and then recast the pairs (taking advantage of their reciprocal contrast) as single positives. ***Landlord must not withhold its consent if*** can often be recast ***Landlord must grant its consent if***.

But there is an often-overlooked danger with this technique: It assumes that there are only two options: either a thing or quality exists, or its opposite exists, with no grey area between them and no other options. (I like to call this the "Kierkegaard presumption," after the nineteenth-century Danish philosopher and theologian who wrote *Either/Or*.) Lawyers learn early in their careers that the universe is not so dualistic.

Consider the phrase ***Landlord must not be unreasonable***. Can it always be rewritten ***Landlord must be reasonable***? I don't think so, because sometimes there are three possibilities: The landlord is acting unreasonably (Situation 1), the landlord is acting reasonably (Situation 2), and the landlord is acting in a way that cannot readily be described as reasonable or unreasonable (Situation 3). Whenever all three situations are possible, the fact that a landlord is not acting unreasonably (not in Situation 1) does not establish that the landlord is acting reasonably (Situation 2); the landlord might, instead, be in Situation 3; the landlord's action might be such as to prevent any assessment of reasonableness.[4]

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[4] There is also a Situation 4, although it is much less common: It could occur when only one course of action seems reasonable. (It's hard to think of examples, so please cut me some slack.) Let's say a commercial-lease provision obligates the tenant to monitor local tax-assessment rulings and requires the tenant to file a tax appeal when new rulings make it virtually certain that the appeal would result in a substantial reduction of the building's assessment. Let's say that in one extraordinary period, following a court decision mandating unprecedented leniency by the taxing authority, the assessments of all of the other comparable buildings in the area are reduced by 75%. And let's say that the tenant intends to seek a similar reduction but waits until close to the appeal deadline, suddenly suffers a debilitating stroke, and misses the deadline. Has the tenant acted reasonably? A court could easily say no. But the same court could just as easily conclude that the tenant had not acted unreasonably. If the tenant's obligation had been changed from ***not acting unreasonably*** to ***acting reasonably***, the tenant would have been in default. If the language had been unchanged, the tenant would not be in default.

Another technique for reducing the use of negative terms is to use graduated indentation (sometimes called tabulation) that clearly illustrates the level or levels to which a negative term or condition is limited. We can illustrate this with Wydick's mind-numbing example of a paragraph that is replete with negative terms:

> No rate agreement shall qualify under Section 2(a) unless not fewer than thirty days notice is given to all customers; and unless said rate agreement has been published, as provided above, provided however, that the publication requirement shall not apply to emergency rates; and until said rate agreement has been approved by the Commission.

Here's how Wydick recasts the paragraph:

> To qualify under Section 2(a), a rate agreement must meet these three conditions:
>
> - All customers must receive at least thirty days notice of it; and
> - It must be published, as provided above (but emergency rates do not have to be published); and
> - It must be approved by the Commission.

Now let's complicate Wydick's example by adding some exceptions to exceptions, rewriting the original paragraph as follows[5]:

> No rate agreement will qualify under Section 2(a) unless not fewer than thirty days notice is given to all customers — except senior-citizen customers, other than those who live in the Midatlantic Region and who have waived their senior-citizen shipping privileges, who will be entitled to only twenty days notice, and except senior-citizen customers who live outside the Midatlantic Region (regardless of whether they have waived their senior-citizen shipping privileges), who will be entitled to only ten days notice — and unless said rate agreement has been published, as provided above, provided however, that the publication requirement will not apply to emergency rates; and until said rate agreement has been approved by the Commission.

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[5] I am also replacing each ***shall*** with ***will***. *See* Principle 17 below.

Using additional tabulation enables us to incorporate the additional details unambiguously:

> To qualify under Section 2(a), a rate agreement must meet these three conditions:
>
> 1. All customers must receive notice of it, that notice to be received by the customers in advance of the agreement by
>   (a) ten days, in the case of senior citizens who live outside the Midatlantic Region, or
>   (b) twenty days, in the case of senior citizens who
>   (i) live inside the Midatlantic Region and
>   (ii) have waived their senior-citizen shipping privileges, or
>   (c) thirty days, in all other cases.
>
> 2. It must be published, as provided above (but emergency rates do not have to be published).
>
> 3. It must be approved by the Commission.

14. Use familiar terms for the parties.

Use the parties' names (abbreviated when the names are cumbersome), personal pronouns, or terms (such as "seller" or "borrower") that explain their role. Don't use non-descriptive terms such as "Party of the First Part." Use the first (***I*** **|** ***my*** **|** ***mine***) and second person (**you | yours**) in instruments, such as notes and mortgages, that need be signed only by one party.

15. Avoid compound constructions.

This is actually a corollary to Principle 3 (omit needless words). There are countless examples, but these illustrate the advantage of brevity:

- ***at that point in time*** says nothing more than ***then***
- ***in the event that*** says nothing more than ***if***
- ***for the reason that*** says nothing more than ***because***
- ***notwithstanding the fact*** says nothing more than ***although***
- ***until such time as*** says nothing more than its first word (***until***)

16. Avoid "noun chains."

Wydick's example:

> draft laboratory animal rights protection regulations

His rewrite:

> draft regulations to protect the rights of laboratory animals

17. Use *shall* rarely, if ever. Use *must, will,* or *should,* as appropriate, instead.

Volumes have been written, and many debates have raged, on the differences between these terms. But most Plain Language authorities insist that ***shall*** is a hopelessly ambiguous word. Garner points out that, in different contexts, it means ***must***, ***may***, ***will***, and even ***is***. They are not uniform in what they prescribe in its place. But I adhere strictly to two rules:

If *shall* describes	**use instead**
an obligation	***must*** or ***agrees to***
a certainty	***will***

18. Don't use *may* to express a possibility. Use *might* for that purpose. Use *may* only to express permission, and do that only when there is no alternative way to denote permission less ambiguously.

"May" means many things. Two of its principal functions are to denote possibility and to denote permission. Often its use leaves the reader guessing which of those two uses the writer intended. Consider ***tenant may exercise its right of first refusal.*** Without more, the reader doesn't know whether the writer meant that the tenant is permitted to exercise its right or whether, instead, the tenant is likely to exercise it.

"Might," by contrast (when used as a verb), is less likely to confuse. ***Tenant might exercise its right of refusal*** will not likely be misinterpreted as meaning merely that the tenant has the power to exercise its right.

Using "may" to express permission might also leave the reader uncertain as to the writer's intent. If my purpose is to explain that a tenant is permitted to exercise its right of first refusal, there are more reliable ways to do that. ***Tenant is permitted to exercise its right of first refusal*** leaves no one guessing. But context often serves to avoid ambiguity when "may" is used

to express permission. Consider this excerpt from an example used above to illustrate Principle 6:

> Buyer must deliver timely proof of Buyer's fulfillment of the financing contingency described immediately above. If Buyer does not deliver that proof, Seller must make a decision: Seller may decide to terminate this Agreement, or Seller may decide to postpone the Settlement Date. If Seller decides to terminate this Agreement, the termination will take effect as of the end of the Initial Contingency Period.

The use of the words ***must make a decision*** immediately before the sentence that lists two things that the seller ***may*** do leaves no doubt that the writer intends to describe those things not as likelihoods but merely as things the seller is permitted to do. Thus there is no ambiguity to fix by substituting ***is permitted to*** for the two instances of ***may*** in the example.

19. Use headings frequently.

Hopefully this list illustrates the point.

20. If you bill by the hour, be willing to eat some time. (Lots, actually.)

It takes time to be concise. But if you're successful, the words will flow as though you composed them effortlessly.

That's the dilemma for the lawyer whose client pays by the hour: The more time the lawyer spends polishing a difficult work product, the less the client might be willing to pay for it. It's easier to justify spending three hours to produce ten pages than ten hours to produce three. Never mind that the ten-page piece might have bored or confused the judge and could have cost you the case.

I often don't bill the time I have spent polishing something I have written. Instead I bill only the time it took to ensure that the piece was thorough and effective. I will eat the rest in the interest of client relations.