Drafting in Plain Language: Leaving Legalese Behind

Presented by Debbie Haskins
Attorney & Assistant Director
Office of Legislative Legal Services
Colorado General Assembly
May 25, 2016
Topics

► What is Legalese?
► Why should it be avoided when drafting bills?
► How can legislative attorneys and editors recognize and eliminate it?
► The Eight Plain Language Rules
► Exercises to illustrate plain language principles when drafting legislation

What is Legalese?

► “The specialized language of the legal profession”
► “Language containing an excessive amount of legal terminology or of legal jargon”
► “The language used by lawyers that is difficult for most people to understand; legal jargon”

1 www.Merriam-Webster.com
2 www.Dictionary.com
3 www.Merriam-Webster.com
Generally, Legalese is frowned upon by people who teach legal writing, but some people actually defend it:

▶ “It’s very important for attorneys to be well-versed in legalese. Regardless ... using legalese can have some serious downsides, and thus must be practiced with care (but it generally must be practiced nonetheless).” – Jeremy Byellin

Others will say Legalese is necessary because sometimes you have to use “terms of art”.

Term of art: “A word or phrase that has special meaning in a particular context”¹

Sometimes a true technical term or term of art is a shorthand between lawyers and can genuinely be useful because it conveys a legal concept.

- Res Ipsa loquitur
- Double Jeopardy
- Stare Decisis
- Testamentary Intent
- Indemnify
- Habeas Corpus
So what’s the problem with using a legal term of art in legislation?

➤ Lay people don’t know what these terms mean.

➤ Our goal in bill drafting should be to write legislation as understandably as the subject matter allows.

Let’s Take a Poll

➤ What level of comprehension should legislative drafters strive for when drafting legislation?

➤ a) 3rd grade level
➤ b) 8th grade level
➤ c) High school graduate
➤ d) College level
Let’s Take Another Poll

- Why should legalese be avoided in drafting legislation?

- a) It is unfriendly to readers
- b) Readers can’t understand the meaning of the law
- c) Readers can’t follow the law if they don’t understand the law
- d) Being concise and succinct is preferable
- e) All of the above

Legalese is more than just using legal jargon

- Problems with ambiguous legislation are often due to poor writing construction and sloppy habits.

- When we write like we want everyone to know we went to law school, our legislation falls short.
There is an Alternative to Legalese

Plain English for Lawyers by Richard C. Wydick

“Clear writing from your government is a civil right.”
Former Vice President
Al Gore, 1998
RULE #1 - Omit surplus words

Figure out what are the "working words" and what are the "glue words" (the, of, by). Working words show the action - they are the key words. "Glue words" are the connecting words.

Example:

- In the event that the director objects to the filing of the complaint, the director, in his discretion, may file a responsive pleading subsequent to the filing.

Better with some editing:

- In the event that if the director objects to the filing of the complaint, the director, in his discretion, may file a responsive pleading subsequent to the filing.

Final:

- If the director objects to the complaint, the director may file a responsive pleading.

Example:

- The attorney general is empowered to appoint such personnel as may reasonably be required to carry out the functions prescribed for his office.

Better with some editing:

- The attorney general is empowered to appoint such personnel as may reasonably be required to carry out the office's prescribed functions.

Final:

- The attorney general may appoint personnel as needed to carry out the office's prescribed functions.

When in Doubt, Cut It Out
A corollary to omitting surplus words - Avoid doublets and triplets

- “Null and void”
  - “Void” is sufficient

- “I give, devise, and bequeath”
  - “I give” is sufficient

**Historical Note: Legalese arose from a time when using multiple languages enhanced clarity.

“Free and clear” --- from “freo” - (old English) and “cler” (old French)

The French also put the noun in front of the adjective - giving us such phrases as:
  fee simple, attorney general, court martial, accounts payable

Rule #2: Use Action Verbs, Not Nominals

A **nominal** is a verb that has been changed into a noun

- The social worker performs an **assessment** of the child’s injuries.

Instead, try using an **action verb**

- The social worker **assesses** the child’s injuries.
Rule #2: Exercise

Use action verbs - Eliminate the nominals:

The teacher conducts a review of the circumstances. The principal makes a determination of how to measure the students’ performance.

Answer:

The teacher \textit{reviews} the circumstances. The principal \textit{determines} how to measure the students’ performance.

Rule #3: Use the Active Voice Rather than the Passive Voice

In passive voice:

- The object becomes the subject
- The doer of the action (the usual subject or actor) disappears, or is ambiguous, or moves to the end of the sentence in a “by” phrase
- The verb uses a form of “to be” with the past participle*

*Past Participle expresses past action and is usually formed by adding -ed or -en to the base form of the verb

**Tip: If you see the words “by” or forms of “to be”, the passage is probably written in passive voice.
Examples

Passive:
The rule was adopted by the state board.

Active:
The state board adopted the rule.

**Tip: Focus on identifying the actor, the action, and the object of the sentence (if there is one).**

Rule #3 Exercise

Make this passage active

- (1) The standardized document shall be updated annually and shall include but need not be limited to:
  (b) A list of immunizations currently recommended for children by the center for disease control advisory committee on immunization practices.

- (1) The DEPARTMENT SHALL UPDATE THE standardized document shall be updated annually and shall include but need not be limited to IN THE STANDARDIZED DOCUMENT AT LEAST THE FOLLOWING:
  (b) A list of immunizations currently recommended for children by the center for disease control advisory committee on immunization practices.

This statute did not explain who the actor was - it's the department. And "but need not be limited to" is replaced by "shall include ... at least the following"
Rule #3 Exercise

Make this passage active

24-35-112. Legal adviser. The attorney general \textbf{shall be} the legal adviser for the department of revenue and \textbf{shall have} control of all matters relating to the interpretation of law, commencement of legal proceedings, and conduct of legal actions for the enforcement and collection of delinquent taxes, assessments, and licenses referred to \textbf{him} for collection. No member of the attorney general's staff \textbf{shall} receive any payment of state taxes, assessments, or licenses.

Notice the future tense of this section - shall be. How can you write this in active voice? Also, while we're at it let's make this gender neutral.

As a general rule, it's recommended that you not start a sentence with the word "No". It's better to recast the sentence and place the "not" next to the verb -- A member of the attorney general's staff \textbf{shall not} receive any payment of state taxes, assessments, or licenses.
When Passive Voice is the Right Choice

When amending an existing statute or changing a statute on revision, the drafter or editor should retain passive voice:

- When the actor's identity is unknown;
- When there are multiple actors and it would be difficult to determine the proper actor; or
- When you are unable to determine if the statute was written that way for "planned ambiguity".

For instance, how should this passive sentence be amended? Who is the actor?

(1) In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a court determination of death and status apply:

(a) Death occurs when an individual is determined dead under section 12-36-136, C.R.S.

Rule #4: Use Short Sentences

Here's an example of a statute that does not use short sentences:

Any person who knowingly and willfully makes any false statement in or supplies any false information for or for purposes of deception applies for, alters, mutilates, uses, attempts to use, applies for amendments thereto, or furnishes to another for deceptive use any vital statistics certificate, and any person who knowingly and willfully and for purposes of deception uses or attempts to use or furnishes for use by another any vital statistics certificate knowing that such certificate contains false information or relates to a person other than the person with respect to whom it purports to relate, and any person who manufactures, advertises for sale, sells, or alters any vital statistics certificate knowing or having reason to know that such document establishes or may be used to establish a false status, occupation, membership, license, privilege, or identity for himself or any other person, and any person who uses any such document to commit a crime is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.
How do we know there’s too much info jammed into this section?

In WordPerfect you can do a word count.

This one sentence has 196 words.

It contains at least 6 different criminal acts.

Any person who knowingly and willfully makes any false statement in or supplies any false information for or for purposes of deception applies for, alters, mutilates, uses, attempts to use, applies for amendments thereto, or furnishes to another for deceptive use any vital statistics certificate, and any person who knowingly and willfully and for purposes of deception uses or attempts to use or furnishes for use by another any vital statistics certificate knowing that such certificate contains false information or relates to a person other than the person with respect to whom it purports to relate, and any person who manufactures, advertises for sale, sells, or alters any vital statistics certificate knowing or having reason to know that such document establishes or may be used to establish a false status, occupation, membership, license, privilege, or identity for himself or any other person, and any person who uses any such document to commit a crime is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

We don’t have time to fix this during the webinar – send your rewrite to me at debbie.haskins@state.co.us and we’ll send out the best examples to the participants by e-mail.
Rule #5: Arrange Your Words with Care

- Follow normal English word order - Subject, verb, then the object.
- Why? The reader is looking for this. Writing in standard English aids comprehension.
- Too often, there are expansive leaps between the subject and the verb and the verb and the object.

Example:

25-5-406. Tagging articles misbranded or adulterated. (3) If the court finds that a detained article is adulterated or misbranded, such article shall, after entry of the decree, be destroyed at the expense of the claimant thereof, under the supervision of such agent, and all court costs and fees and storage and other proper expense shall be taxed against the claimant of such article or his agent.

Subject, Verb, Object

25-5-406. Tagging articles misbranded or adulterated. (3) If the court finds that a detained article is adulterated or misbranded, the court shall order the destruction of the adulterated or misbranded agent. The agent shall destroy the adulterated or misbranded article. The claimant of the article must pay to the agent any court costs, fees, and costs for storing and destroying the adulterated or misbranded article.

How can you write this in normal English word order?

Best remedy - break this up into multiple sentences and write the sentences in the subject, verb, object format and put it in active voice

25-5-406. Tagging articles misbranded or adulterated. (3) If the court finds that a detained article is adulterated or misbranded, the court shall order the destruction of the adulterated or misbranded agent. The agent shall destroy the adulterated or misbranded article. The claimant of the article must pay to the agent any court costs, fees, and costs for storing and destroying the adulterated or misbranded article.
Misplaced prepositional phrases can also cause trouble

- Notwithstanding any order for expungement, nothing prevents the district attorney, including the staff of a victim assistance program, from discussing the case or the results of any proceedings, providing information regarding restitution, and information related to victim services \textit{with the victim as defined in section 24-4.4-302, C.R.S.}

- That’s confusing, isn’t it? Let’s move the prepositional phrase to its rightful place:

- Notwithstanding any order for expungement, nothing prevents the district attorney, including the staff of a victim assistance program, from discussing the case or the results of any proceedings \textit{with the victim as defined in section 24-4.4-302, C.R.S.}, or providing information regarding restitution and information related to victim services.

Rule #6: Use Familiar Concrete Words

- Rule of statutory construction:

- \textbf{2-4-101. Common and technical usage}. Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

- Use the common word rather than using a word that sends your reader to the dictionary.
Vote for the Better Word Choice

- Utilize
- Use
- Tasked with
- Required to
- Within and under the provisions of
- In

Really, these archaic words are obsolete and unnecessary:

- “Herein”
- “Heretofore”
- “Therein”
- “The aforesaid”
- “Said” - substitute "the" or "a"
- “Such” - substitute "the" or "a"
- Provisos such as "provided that" - substitute “so long as” or “if”
- “In the event” - substitute “if”
- “Subsequent to” - substitute “after”
Rule #7: Avoid Language Quirks

- Avoid "elegant variation" - or drawing on another rule of drafting - use the same terms consistently throughout the statute.

  - A rose is a rose is a rose.

- You are not writing poetry - This is not the time to call a rose a bud or a floweret. It’s a rose!

More Language Quirks: Avoid Multiple Negatives

- It shall be unlawful to fail to stop at a red light on a traffic signal.

  - Rewritten in the positive:

  - A driver who fails to stop at a traffic signal with a red light commits a traffic offense.
Even More Language Quirks

- Avoid gender-specific language - modernize the terms to eliminate references to he or his.

Rule #8: Punctuate Carefully, in Accordance with Ordinary English Usage

- In the interest of time, we are not going to go over examples of punctuation - see the resource list for some good manuals of style to use for correct punctuation.
Here’s my favorite bad statute:

22-1-102. Residence of child. (2) A child shall be deemed to reside in a school district if:

(b) The legally appointed guardian of his person resides in the school district;

(c) After emancipation by his parents, or the survivor thereof, from their or his control, and he has no guardian, he lives within the school district;

... (f) If one of the child’s parents or the guardian of his person is a public officer or employee living temporarily for the performance of his duties in a school district other than that of his residence. Unless the parents of a child are permanently separated, the residence of the husband shall be deemed to be the residence of the child, but, if the parents are permanently separated, the residence of the child shall be that of the parent with whom the child actually lives.

Final Exercise

What things are wrong in this passage?

(b) When a letter of admonition is sent by the director, by certified mail, to a registrant, such recipient shall be advised that he has the right to request in writing, within twenty days after receipt of the letter, that formal disciplinary proceedings be initiated to adjudicate the propriety of the conduct upon which the letter of admonition is based.

- 1) It’s written in passive voice
- 2) It’s written in passive voice and it uses vague terms like “such”.
- 3) It’s written in passive voice, it uses vague terms like “such”, and it is not gender-neutral.
- 4) It’s written in passive voice, it uses the term “registrant” and “recipient” for the same person, its uses the vague term “such”, and it is not gender-neutral.
The correct answer is 4!

Edited passage:

(b) When the DIRECTOR SENDS a letter of admonition, such recipient shall be advised that he or she has the right to request in writing, within twenty days after receipt of the letter, that the DIRECTOR INITIATE formal disciplinary proceedings to adjudicate the propriety of the conduct upon which the letter of admonition is based.

Thank you

- If you’d like to participate in our contest to improve on the two badly written statutes, please submit your answers to the two exercises to me at debbie.haskins@state.co.us by June 1. We’ll post the best examples on this webinar’s homepage a few days after June 1.
- Thank you to Jessica Wigent, Ph.D., Legislative Editor, Colorado Office of Legislative Legal Services, who helped me create this PowerPoint.
- Thank you to Kae Warnock, NCSL, who helped me produce this Webinar.
Questions?
Contact Kae.Warnock@ncsl.org