# Clear legal writing

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## What's the matter with judicial writing?

J.G. Mackay suggested that:

> **Good drafting says in the plainest language, with the simplest, fewest, and fittest words, precisely what it means.**

The Civil Procedure Rules are written in plain English, and they suggest (where they do not demand) the commonsense approach that litigation documents should be intelligible and to the point. If solicitors and counsel are to improve on their currently atrocious writing style, judges must set a better example. What does this mean in practice?

Here is one court's standard pre-Woolf practice direction:

> **Except with the leave of the court, or where all parties agree -**
>
> **(i) no expert evidence may be adduced at the trial unless the substance of that evidence has been disclosed in the form of a written report within 35 days after inspection;**
>
> **(ii) The number of expert witnesses of any kind shall be limited to two except that in an action which includes a claim or counterclaim for personal injuries the number of expert witnesses shall be limited to two medical experts and one expert of any other kind.**

This is not a terrible example, but (among other defects) ...

- The repetition — and particularly the overuse of "of" — is a clue to loose writing: we have 7 "of"s, 2 "except"s, 2 "evidence"s, 2 "shall be"s, and 4 "expert"s.
- It is unnecessarily wordy: for instance, nothing *but* a number could be "limited to two".
- Only a lawyer would write anything as stilted as "The number of ... witnesses shall be limited to two" instead of the natural "No more than two witnesses may be called".
- There are inconsistencies in the construction: between "with the leave of the court" and "where all parties agree", and between "no expert evidence may be" and "the number shall be limited to two".
- There are unnecessary triple negatives: "Except with (leave) ... no expert evidence ... unless..." and "Except with (leave) ... The number shall be limited ... except ...".

Nor is the text precise, despite all that jargon:

- The judge presumably meant (but does not say) that *each side* is limited to two (or three) experts. (Or could one party bar the other from expert evidence by getting in first with two experts?)
- If "shall" is used in its mandatory rather than its future sense (an important distinction

rarely made), it is wrongly applied: you cannot sensibly order a number to be limited. The verb should be in the present tense: "The number ... is limited ...."

- Inspection is rarely in practice identified with a single day, so "within 35 days after inspection" is meaningless. Inspection is usually effected by post, rarely by simultaneous exchange, sometimes early, more often late, and often over an extended period as more documents are remembered or found. The judge may have *intended* "within 35 days after the last day allowed under the last paragraph for inspection", but this is not expressed.

## How might judicial writing be improved?

### The example

How could this direction have been improved? One possibility, which reduces the original 90 words to 37 or 41, is:

> **Unless the court or all parties agree otherwise, expert evidence:**
> **(1) is limited to that of two witnesses* for each party; and**
> **(2) may be admitted only if summarised in a written report disclosed before 1st July.**
> **[* *In a personal-injury case substitute:* two medical and one other witness]**

Of course, in PI cases whoever makes the order should incorporate the words in parentheses into sub-paragraph (1) and in non-PI cases delete them; the note is an instruction to the writer, not the reader. (In the note I have adopted Bryan Garner's suggestion that we hyphenate compound adjectives to avoid miscues.)

### Some general guidelines

Here are a few general guidelines for plain writing:

- *Use typography and layout to your advantage.*

  Make your text look attractive.

  Use plenty of white space, in the margins and between paragraphs.

  Distinguish headings from text by font and by bold or italic type, rather than by underlining or long strings of capital letters. Try using a sanserif font like Helvetica or Arial for headings. ("Sanserif" fonts do not have the tiny cross-strokes which decorate the top and bottom of letters in a "Roman" font.)

  Distinguish sub-headings from headings by smaller type.

  Distinguish sub-paragraphs from paragraphs by indenting them (and sub-sub-paragraphs by further indentation).

- *Structure the document sensibly.*

  Get to the main point quickly, and deal with details and exceptions later.

  Deal with related topics together, in successive sections, paragraphs, sub-paragraphs, or sentences (as appropriate).

Allocate different paragraphs (or even different sections) for different topics.

- *Keep sentences short.*

  Break up long sentences into shorter ones, restricting each to one or two points.

  Remove unnecessary words.

- *Choose the right words*

  Avoid both fancy and archaic words.

  Use jargon only when you need to, and then explain it for the lay litigant.

  Think what you're saying and in particular avoid clichés. (This will save you from absurdities like this, attributed by Mark Vale to a "state of the nation" speech: "Last year we were on the edge of a great abyss. But this year we have taken a giant leap forward!")

- *Be direct*

  Use active verbs unless there is a good reason to use the passive.

  Use positive statements unless there is a good reason to use the negative.

  Use the present tense unless there is a good reason to use the future. And distinguish the future from the imperative by "will" and "must"; do not use "shall" for both.

- *Don't turn verbs into phrases*

  "Decide", rather than "reach a decision"; encourage parties to "apply", not "make an application".

- *Edit*

  Imagining yourself to be your intended reader, re-read the document from beginning to end at least once after you finish it. If you have more than one type of intended reader (for instance, lawyers, their lay clients, and the Court of Appeal), re-read it with each in mind. If time permits, do this after leaving the document unread for at least several days. Ideally re-read from beginning to end after even a trivial change.

  If the document is important enough, have someone else read it too. If they say something is unclear, don't argue: clarify it.

**Summary**

In short:

- Think what you want to say.
- Say it clearly and unpretentiously.
- Then stop.

My thanks to Professor Joseph Kimble of Thomas M. Cooley Law School in Michigan for his help with this article (and especially with rewriting the example, an apparently simple task which I found challenging).