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Of Plain English and Plain Meaning

By Virginia C. Thomas

An increasing number of jurists have a passion for plain English—and they are not afraid to talk about it. Pivotal events in the plain English movement in Michigan date back to the development of court forms by the District Judges Forms Committee in the mid-1970s.¹ Judge Frederick G. Mather, then president of the District Judges Association, is credited with initiating the development of recommended general forms under the District Court Rules.² Today, judges at the state and federal levels regularly express their views on plain English inside and outside of their judicial opinions. Some even have used a different approach to interpreting statutory language. These are some of their stories.

Opinions on (and in) opinions

In a recent interview, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit reflected on the use of legal jargon in court opinions.³ In his view, judges should avoid legalese. Regarding the term *arguendo*, for example, the judge posits, “[W]hy on earth would you use the Latin word when you have a perfectly good English substitution?”⁴

Posner’s approach supports access to justice:

One thing that’s troublesome is that there are a great many litigants who do not have lawyers and I think to not have a lawyer and to be involved in a lawsuit is very, very difficult. But it’s made more difficult if what the judges say, whether orally or in writing, is in an esoteric, professional discourse that laypeople don’t understand.⁵

He has not confined his views to legal commentary. In a recent case, *United States v Dessart*,⁶ he issued a concurring opinion

that questioned “some of the verbal formulas in the majority opinion” such as the use of hyperbole, metaphor, and other rhetorical devices. He concluded, “Everything judges do can be explained in straightforward language—and should be.”⁷

On a different aspect of clear communication, Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit criticized the use of abbreviations and acronyms by attorneys for both parties in a recent case. His ruling in *National Association of Regulatory Utility Commissioners v U.S. Department of Energy*⁸ included a footnote stating that the attorneys “abandoned any attempt to write in plain English, instead abbreviating every conceivable agency and statute involved, familiar or not”⁹ In a subsequent case, he reportedly told the attorneys that they had not read the pertinent court rules and described their overuse of acronyms as “painful.”¹⁰

This kind of thing frustrates even the most experienced law librarians, particularly when the acronyms are not familiar or readily found. Reliance on even commonly used acronyms can give rise to some pretty peculiar interpretations. For example, *stricken on leave* is abbreviated SOL, as is *statute of limitations* and *sadly outta luck* (in the polite form).¹¹ Time to bring out the *Bieber’s*!¹²

Potholes or pavement failures?

Sometimes, judges make a practice of speaking truth to power outside of court opinions. Mark P. Painter, now retired from the bench, served as an Ohio Court of Appeals judge from 1995 to 2009, when he was elected to the United Nations Appeals Tribunal by the General Assembly. Painter has been an ardent advocate of good legal writing throughout his career. He has written three books and more than 100 columns on the subject¹³ and has taught advanced legal writing.

Painter is respected for his direct, fervent commentary on plain English tempered with a sense of humor. For example, one of his latest columns highlighted the following example of “amok” words:

Quantas airlines got [Plain English Foundation] prizes in both [2013] and 2014. In 2013, Quantas described a near-collision as a *loss of separation*. For 2014, Quantas explained the cause of a flight delay as a *pavement failure*. There was a pothole in the runway that had to be filled in before the plane could take off.¹⁴

From legal writing to statutory interpretation

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summary judgment, is essential to the practice of law. Which tools are appropriate for courts to use in interpreting the ordinary meaning of legislative language continues to be a matter of debate among judges. In a recent Utah Supreme Court case, *State v Rasabout*,¹⁵ the majority and concurring justices disagreed as to whether the Court should use a “corpus linguistics analysis”¹⁶ to determine the meaning of the statutory phrase *unlawful discharge of a firearm*. Should each of 12 shots fired by the defendant constitute a discrete discharge of the weapon and carry a separate conviction or should all 12 be consolidated in a single count?

The Court considered the derivation of *discharge* as well as the statutory context, dictionary definition, and commonsense meaning of the term. It determined that *discharge* referred to each shot fired—and each shot constituted a separate violation, affirming the appeals court.

Now for the rest of the story. In the majority opinion, Utah Supreme Court Chief Justice Parrish also admonished Associate Chief Justice Lee for his concurring opinion, which “charges the court with coming to this conclusion by plucking a definition from a dictionary on the basis of cloaked intuition.”¹⁷ Lee defended his position, arguing that dictionaries are also compiled from linguistic corpora, which may be useful to courts for statutory interpretation. He was simply applying a new tool to the process.

Earlier this year, the Michigan Supreme Court encountered a similar challenge in *People v Harris*.¹⁸ The Court addressed the question of whether the Disclosures by Law Enforcement Officers Act (DLEOA)¹⁹ bars the state from using the defendant law enforcement officers’ false statements made during an earlier internal affairs investigation against them in the context of a pending criminal proceeding. Did the term *information* in the statute include false as well as true statements?

The Michigan Supreme Court reversed the Court of Appeals. In delivering the majority opinion of the Court, Justice Zahra wrote, “The plain language of the DLEOA controls our resolution of this dispute and compels us to agree with defendants.”²⁰ As in *Rasabout*, the *Harris* Court considered the ordinary meaning of a term—in this case,

information. It examined the term in its statutory context and checked the definition from three dictionaries. Unlike the *Rasabout* Court, however, the *Harris* Court *did* apply corpus linguistics analysis to the task. The selected database, *Corpus of Contemporary American English*, provided definitional and contextual data that “strongly suggests that the unmodified word ‘information,’ can describe *either* true or false statements.”²¹

In *Harris*, the Supreme Court specifically criticized legislative analyses prepared by Michigan House and Senate staff for their lack of interpretive use or persuasive value.²² The Court chose instead to use empirical data to interpret legislative language. Corpus linguistics analysis supersedes legislative analyses in this case. We may be seeing a new direction in the search for plain meaning in Michigan statutory law. ■



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ENDNOTES

1. Ulrich, *Plain English in Judicial Administration: Michigan's Standardized Court Forms*, 63 Mich B J 390 (1984).
2. *Id.*
3. Tillman, *Posner on Jargon: Judges Must Cease and Desist*, National Law Journal (May 23, 2016), p 6.
4. *Id.*
5. Tillman, *Q&A: Judge Posner on Writing, Law School and Cat Videos*, National Law Journal (May 18, 2016) <<http://www.nationallawjournal.com/id=1202757990658/QampA:Judge-Posner-on-Writing-Law-School-and-Cat-Videos&curindex=9>>. All websites cited in this article were accessed September 21, 2016.
6. *United States v Dessart*, 823 F3d 395 (CA 7, 2016) (Posner, J., concurring).
7. *Id.* at 407–408.
8. *Nat'l Ass'n of Regulatory Utility Comm'rs v US Dep't of Energy*, 401 US App DC 15; 680 F3d 819 (2012).
9. *Id.* at 820 n 1.
10. Mike Scarcella, The BLT: The Blog of LegalTime, *In D.C. Circuit, Judge Calls Use of Acronyms 'Painful'* <<http://legaltimes.typepad.com/blt/2012/11/in-dc-circuit-judge-calls-use-of-acronyms-painful.html>> [posted November 19, 2012].

11. The Free Dictionary, *Acronyms and Abbreviations* <<http://acronyms.thefreedictionary.com/sol>>.
12. Prince, *Bieber's Dictionary of Legal Abbreviations: A Reference Guide for Attorneys, Legal Secretaries, Paralegals, and Law Students* (Getzville: William S Hein & Co, 5th ed, 2001).
13. See Judge Mark Painter, *Resume* <http://www.judgepainter.org/resume/MPP_Resume.pdf>.
14. Painter, *Words Run Amok*, Legal Writer #81 <<http://www.judgepainter.org/number81.pdf>>.
15. *State v Rasabout*, 356 P3d 1258 (Utah 2015).
16. Corpus linguistics is an approach to the study of language based on large digital collections of written and spoken language. “These databases can easily be searched to retrieve examples of how words or phrases have been used in different contexts at different times.” Note, *State v Rasabout*, 129 Harv L Rev 1468 (2016).
17. *Rasabout*, 356 P3d at 1,264.
18. *People v Harris*, 499 Mich 332; ___ NW2d ___ (2016).
19. MCL 15.391 *et seq.*
20. *Harris*, 499 Mich at *4.
21. *Id.* at *5.
22. *Id.* at *6 n 48.

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