Litigation #28

"I Know It When I See It": A New Way to Define the "Plain" in "Plain English"

We should all congratulate the many excellent people who, in the past 60 years, have labored to recognize the need of ordinary, non-lawyer folks to understand the language of legal documents that control important parts of their lives. We all should be able to understand what our rights are under lay-away plans, insurance policies, and real estate rental agreements. 37 States now require that documents like these must be written in what is called "Plain English." That is a wonderful achievement. One problem, however, persists: All of this legislation fails to understand what makes English "plain." I have a remedy to suggest.

In 2010, the Federal Government gave us the Plain Writing Act. It offers a simple and succinct definition:

> The term 'plain writing' means writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience.

Given this attempt at definition, one might ask *how* we are further to define clarity, concision, and good organization. We also might wonder what "other best practices" might mean. We hope that at the end of our efforts we are not left with Mr.

Justice Potter Stewart's half-profound, half-flippant response to the term "hard core pornography": "I can't define it, but I know it when I see it."

Here is New York's definition of "Plain English" (Gen Oblig. §5-702):

> "Such documents must be
>
> 1. Written in a clear and coherent manner using words with common and everyday meanings;
>
> 2. Appropriately divided and captioned by its various sections."

That's it: 22 words. Though this may be minimalist, it is not silly. It indeed invokes the spirit of Justice Stewart: Prose that is not clear and coherent? We know it when we see it. And we don't want to see it. And, in addition, we like white space and captions.

But most States go further than this. Connecticut, for example, offers us a choice (Stat. § 42-152): Either (A) it means what New York said, or (B) your document has to comply with *all* of a set of specific restrictions. Here are five of the items on Connecticut's list:

> (1) The average number of words per sentence

must be less than 22; and

(2) No sentence in the contract can exceed 50 words; and

(3) The average number of words per paragraph must be less than 75; and

(4) No paragraph in the contract can exceed 150 words; and

(5) The average number of syllables per word must be less than 1.55.

A failure to meet any *one* of these five constitutes a failure for the document as a whole.

Such a tidal wave of specificity surely must give us hope that someone from or hired by Connecticut has actually discovered how to determine readability in documents. Personally, I find it breath-taking. With all the writing and reading I have done in my life, I have never once considered whether the prose I was producing or consuming exceeded an average of 1.55 syllables per word. To my surprise, when I investigated this oddly precise statistic by a random selection of texts, I found it did indeed seem to be something of a dividing line – not between the readable and the unreadable, but rather between the simple and the sophisticated. Complex matters often require a greater number of multi-syllabic words. (The syllables-per-word ratio of the previous sentence is 2.0 – way above the allowable 1.55. Surprisingly, if you substitute “long” for “multi-syllabic,” it is still an unacceptable 1.6.)

The great majority of the PE statutes, not finding anything better than this, choose to pass the linguistic buck to those who have produced the complex calculations of our several "readability" formulae. These formulae usually rely on (1) counting words, syllables, clauses, and multi-syllabic words , (2) calculating ratios (words per sentence, syllables per word), and (3) then using these statistics to draw quantitative lines in the sand. These formulae have proven fully adequate to assess whether a given selection of readings would be more appropriate for use in the sixth grade or the eighth grade; but they fail dramatically when applied to sophisticated prose that attempts to deal with complex matters. The latter will usually be the case with any suit about language that makes its way to a court of law.

These formulae seem to be what the 2010 Federal statute is referring to as "other best practices." Formulae often applied are the Coleman-Liau, the ARI, the FOG, and the SMOG. (SMOG stands for Simple Measure of Gobbledygook. There is nothing simple about it.) The most common one, however, used by 34 of the 37 State statutes, is the Flesch-Kincaid Readability Formula. Its astonishingly scientific looking calculations, extending to the third decimal place, place the highest value on how many syllables per word the document averages. Here is what the Flesch test tells us to do: First ascertain the words per sentence ratio and multiply it by 1.015 – the tiniest bit above 1.0. Then ascertain the syllables per word ratio and multiply it

by 84.6 – the largest number the mind can imagine in a context dominated by a multiplicand the size of 1.015. Finally, add those two resulting numbers together and subtract that total from 206.835 (I kid you not), and there you have your Flesch score. Some statutes define Plain English as anything with a Flesch score over 45.

This heavy concentration on the syllables per word ratio fails entirely when a text is forced by its subject matter to use many multi-syllabic words. If we are worrying about whether *employees (3 syllables)* are *eligible* (4) for certain *retirement (3) benefits (3)*, the Flesch test will be of no help. Could we even think about discussing *eligibility* (6)?

All the fuss about the syllables per word ratio is an attempt to limit the level of vocabulary – again, a significant concern in assembling a reader for the eighth grade. The other concerns that regularly are voiced in PE statutes are the same ones found in writing textbooks: Favor short sentences; avoid the passive; keep paragraphs short; and keep vocabulary simple.

Did you have any difficulty reading the last paragraph? Here is the Connecticut scoreboard for it: The 30.5 word per sentence average greatly exceeds the required overall average of 22; its syllable per word ratio is 1.66, well above the allowable 1.55; and the Flesch score for the paragraph is 35.44, well below the 45 required to achieve readability status. And *this* is how two-thirds of our States calculate readability?

How then should we calculate plain English? I have been assembling that answer for you for the seven years I have been writing this quarterly column. I have been explaining how readers go about making sense of words on a page. My language theory is simple enough to state: Readers, I claim, look for the answers to crucial questions of interpretation in certain structural locations within the English sentence. Whose story is a sentence? Whoever or whatever shows up as the grammatical subject. What action is happening? The verb will tell you. And, most importantly, which words in a sentence should be read with extra emphasis because they are the stars of the show? Whatever words appear just before a colon, semi-colon, or period – that is, at any moment of full syntactic closure. Calculate how often a document succeeds at placing those pieces of information in the expected place: That will determine whether the document is clearly written – is written in Plain English.

But this is no longer just theory. In 2008, I was hired as an expert witness in a huge class action suit (75,000 employees) in which the plaintiff class claimed that the notices informing them their employee retirement benefits were to be changed were not written in "Plain English," as required by the Federal government. The ten pages of prose I was given failed to qualify as PE under any of the "best practices" in use by any of the State statutes; but the prose, I was convinced, was an exemplar of clarity. I wrote a 120-page opinion that (1) demonstrated why I thought the readability formulae were

useless in such a case, (2) explained a handful of principles from my Reader Expectation Approach to the English Language, and (3) applied those principles to every sentence of the 10 pages in question. The prose scored above 94% for all but one expectation and 77% for the other. An 8.5-hour deposition of me followed, in which not a single question was asked about my expectational theories. Four weeks before the trial (after more than two years of litigation), the plaintiffs' lawyers withdrew the case, *with* prejudice, and without asking the defendant corporation for a settlement. When the judge asked those lawyers why they were doing this, they replied, "We can't beat his argument."

You may access my 88-page article about that case on the Publications page of my website, www.GeorgeGopen.com, where you may also review the 27 previous essays in this *Litigation* series.