



LegalWriting
institute

Monograph Series

Volume 15—Transactional Drafting

This article was originally published with the following citation:

Wayne Schiess, *The Art of Consumer Drafting*, 11 SCRIBES J. LEGAL WRITING 1 (2007).

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The Art of Consumer Drafting

Wayne Schiess

Companies seeking expert advice in approaching a plain-language effort often rely on the same consultants who advise on consumer-product marketing. The two areas have their similarities.¹

Introduction: Consumer Drafting as Art

I made up the term *consumer drafting* a few years ago to describe legal drafting aimed at nonlawyers. More specifically, it means binding legal text that needs to be read and understood by the general public. I believe that most consumer drafting is bad. I believe that most consumer drafting cannot be read and understood by the people who need to read and understand it. And I believe that lawyers should do something about it. I'm trying.

This piece discusses what I've done to prepare myself to improve consumer drafting. After highlighting the nature of the problem briefly, I first discuss some words-and-sentences, grammar-and-usage aspects of consumer drafting. Then, in the main part of the piece, I discuss the ways I had to change my thinking, the ways I had to become more like an artist than a lawyer. I believe that anyone can take the same steps and do some real work in consumer drafting. In taking the steps, you may come to believe, as I did, that consumer drafting is an art.

¹ Carl Felsenfeld & Alan Siegel, *Writing Contracts in Plain English* 91 (West 1981).

The Problem: Bad Consumer Drafting

Bad consumer drafting is the standard, and I don't need to tell you that it's everywhere. It's on the back of your baseball ticket:

THE HOLDER IS ADMITTED ON CONDITION, AND BY USE OF THIS TICKET AGREES, THAT HE WILL NOT TRANSMIT OR AID IN TRANSMITTING ANY DESCRIPTION, ACCOUNT, PICTURE OR REPRODUCTION OF THE BASEBALL GAME OR EXHIBITION TO WHICH THIS TICKET ADMITS HIM. BREACH OF THE FOREGOING WILL AUTOMATICALLY TERMINATE THIS LICENSE.²

It comes with the products you buy:

Any claim or dispute ("Claim") by either you or us against the other, or against the employees, agents, or assigns of the other, arising from or relating in any way to this Agreement or any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether for money damages, penalties, or declaratory or equitable relief), including Claims regarding the applicability of this Arbitration section or the validity of the entire Agreement or any prior Agreement, shall be resolved by binding arbitration.³

And it shows up when you rent a car:

I HAVE READ AND AGREE TO THE TERMS AND CONDITIONS ON BOTH SIDES OF THE AGREEMENT AND THE ACCOMPANYING TICKET JACKET WHICH IS HEREBY INCORPORATED IN THIS AGREEMENT. MY SIGNATURE BELOW IS CONSIDERED TO HAVE BEEN

² From the back of a now long-discarded baseball ticket, which I typed up at the time but have since lost.

³ From a student in one of my drafting classes.

MADE ON ANY APPLICABLE CREDIT CARD VOUCHER AND I AUTHORIZE RENTACAR TO PROCESS SUCH VOUCHER FOR ADVANCE DEPOSITS AND CHARGES INCURRED, INCLUDING PAYMENTS REFUSED BY A THIRD PARTY TO WHOM BILLING WAS DIRECTED.⁴

Much — or most — consumer drafting is so bad that even though I had three years of practice experience in transactional drafting, I still look at most consumer documents and say “huh?”

But “huh?” is not a clear description of the problem, and it does not help us learn how to fix it.

Book Learning as a Solution: Sentences and Words

When I began my quest to improve consumer drafting, I quickly recognized the two most basic problems: long sentences and big words. Understanding the problems these cause in consumer drafting is mostly a matter of academic study or book learning. Let’s take them one at a time.

A. Long Sentences

Rudolf Flesch, an author and expert on readable writing, identified sentence length as a problem in legal writing in 1951: “The main trouble with most legal writing is that the sentences are far too long.”⁵ And it’s difficult to pick up a book on legal writing today that doesn’t encourage lawyers to keep sentences short. For example:

⁴ Again, from a student in one of my drafting classes.

⁵ Rudolf Flesch, *How to Test Readability* 46 (Harper & Bros. 1951).

- From *Plain English for Lawyers*, by Wydick: “Use short sentences.”⁶
- From *The Elements of Legal Writing*, by Faulk and Mehler: “Use short sentences for complicated thoughts.”⁷
- From *Writing to Win: The Legal Writer*, by Stark: “The basic rule is this: The more complicated your information is, the shorter your sentences should be.”⁸

The truth is that when we use long sentences in consumer drafting, we are sending a message: “this text isn’t meant to be read.”⁹ So keep sentences short.

But how short is “short”? There’s no lack of guidance here, either. In legal writing, the average sentence length ought to be:

- 25 words, according to *Mightier Than the Sword*, by Good.¹⁰
- 22 words, according to *Just Writing*, by Enquist and Oates.¹¹

⁶ Richard C. Wydick, *Plain English for Lawyers* 33 (5th ed., Carolina Academic Press 2005).

⁷ Martha Faulk & Irving M. Mehler, *The Elements of Legal Writing* 5 (Macmillan 1994).

⁸ Steven D. Stark, *Writing to Win: The Legal Writer: The Complete Guide to Writing Strategies That Will Make Your Case—And Win It* 33 (Main Street Books 1999).

⁹ Felsenfeld & Siegel, *supra* n. 1, at 23.

¹⁰ C. Edward Good, *Mightier Than the Sword: Powerful Writing in the Legal Profession* 15 (Blue Jean Press 1989).

¹¹ Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* 85 (2d ed., Aspen Publishers 2005).

- 20 words, according to *Legal Writing in Plain English*, by Garner.¹²

We can bring the average sentence length down a bit more when we are preparing legal text for nonlawyers — consumer drafting. So we ought to try for an average sentence length of 20 or under.¹³

As we'll see from an example, we can go a long way toward improving consumer drafting by simply shortening the sentences. The example is a former provision from the Texas Family Code. The “I” speaking here is any person who is a party to a family-law case in Texas:

I am aware that it is the policy of the State of Texas to promote the amicable and nonjudicial settlement of disputes involving children and families. I am aware of alternative dispute resolution methods, including mediation. While I recognize that alternative dispute resolution is an alternative to and not a substitute for a trial and that this case may be tried if it is not settled, I represent to the court that I will attempt in good faith to resolve before final trial contested issues in this case by alternative dispute resolution without the necessity of court intervention.¹⁴

The original of this text appears in ALL CAPS, but I've spared us that here. The sentence lengths are 26, 10, and 62 words, for an average of 33. That's too long an average for consumer drafting, and the 62-word sentence is dreadful. By taking the average sentence length down to 13 words, we make the text manageable. (I also changed the vocabulary, as I'll discuss in the next subsection.) Here is the revision:

¹² Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 19 (U. Chi. Press 2001).

¹³ See Martin Cutts, *Oxford Guide to Plain English* 17 (2d ed., Oxford U. Press 2004).

¹⁴ Tex. Fam. Code Ann. § 102.0085(a) (Supp. 2005) (now repealed).

By signing this statement, I affirm that:

- I know that Texas promotes peaceful, out-of-court settlements of family-law cases.
- I know about noncourt solutions, such as mediation.
- I know that noncourt solutions are an option and not a substitute for a trial.
- I know that this case may go to court if it is not settled.
- I promise to try — in good faith — to resolve this case out of court.

B. Big Words

Consumer drafting, as I've said, is aimed at nonlawyers. When drafting text for nonlawyers, we must shed the urge to impress or to sound "legal." We must communicate, using words that our readers will understand. This means that we must eliminate all legal jargon and root out the excessively formal and the unnecessarily fancy words.

Please don't accuse me of trying to dumb down English or of telling you to limit your vocabulary. All I'm really saying is that you should adapt your drafting to the audience. On this point, Rudolf Flesch said it best when he explained why it's useful to have a strong vocabulary even if we don't use it in everything we write:

So if you have a big vocabulary and know a lot of rare and fancy words, that's fine. Be proud of your knowledge. It's important in reading and in learning. But when it comes to *using* your vocabulary, don't throw those big words around where they don't belong. They are handy for writing formal letters and essays or for scientific and scholarly discussions. Also for solving crossword puzzles. . . .

So it's a good rule to know as many rare words as possible for your reading, but to use as few of them as possible in your writing.¹⁵

Most of us can come up with simpler, plainer words to use in place of legalese or jargon if we have to. But if you are struggling, you can consult an expert. Plain-English expert Joseph Kimble has written an article bravely supplying a list of fancy words with everyday equivalents. "I write this article . . .," he says, "with some trepidation. I will be accused of promoting baby talk, of constricting and dumbing down the language, of denying writers their expressive voice, and of corrupting legal discourse."¹⁶ Despite his concerns, his article is a gold mine for consumer drafters.

How bad can big words get in bad consumer drafting? Consider two examples.

First, here are the problematic words and phrases from the Texas alternative-dispute-resolution text discussed earlier.

- *amicable*
- *nonjudicial settlement*
- *alternative dispute resolution*
- *contested issues*

Those terms are too complex for a text that is to be read and understood by every person in Texas who is party to a family-law case.

And the formality of this phrase is a bit much: "I represent to the court that I will attempt in good faith to resolve before final trial contested issues in this case . . ." Who talks like that? No one, and

¹⁵ Rudolf Flesch, *How to Write Better* 25, 35 (Science Res. Assocs., Inc. 1951).

¹⁶ Joseph Kimble, *Plain Words*, in *Lifting the Fog of Legalese: Essays on Plain Language* 163, 163 (Carolina Academic Press 2006).

certainly not average people. Yet the text purports to be speaking as if it were the average consumer of legal services.

Second, consider this website disclaimer directed at the potential nonlawyer clients of a law firm:

Material contained herein is not offered as legal or any other advice on any particular matter. Material included here is for informational purposes only and is not necessarily an indication of future results. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship between a lawyer and the user or browser. No client or other reader should act, or refrain from acting, on the basis of any matter contained in the Law Firm Home Page without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue.¹⁷

The sentence lengths here — 16, 17, 26, and 41 words — are mostly manageable, although 41 words is a bit long. But the tone and vocabulary are stuffy and formal:

- *material contained herein*
- *not necessarily an indication of future results*
- *transmission of this information*
- *receipt does not constitute*
- *particular facts and circumstances at issue*

These abstract ideas and big words make it tough going for a typical consumer. But if we shorten the sentences and replace the stuffy words, we get something like this:

¹⁷ Source deliberately kept anonymous.

Our website is for information only. We can't give you legal advice through our website, and we can't guarantee you a certain result. So don't rely on anything on this website as legal advice.

Visiting our website does not make you our client. If you have a legal problem, see a lawyer and get legal advice for your specific problem.

We might haggle a bit about a loss in meaning, but as a first cut, this revised text is vastly superior. The sentences are shorter, the vocabulary is simpler, and the level of formality is greatly reduced. It's therefore more accessible to the typical consumer.'

I've tried to show that long sentences and big words are the most fundamental and academic aspects of bad consumer drafting. In truth, many books and articles cover these more academic aspects of consumer drafting.¹⁸ But the ability to revise bad consumer drafting into comprehensible English is built on more than understanding sentence length. And it's built on more than finding shorter, more informal words to replace longer, fancier ones.

To become good at consumer drafting, you'll have to take more radical steps. You'll have to become an artist. Here's how.

¹⁸ See, e.g., Mark Adler, *Clarity for Lawyers: Effective Legal Writing* (2d ed., The Law Soc. 2007); Cutts, *supra* n. 13; Howard Darmstadter, *Hereof, Thereof, and Everywhereof: A Contrarian Guide to Legal Drafting* (ABA 2002); Rudolf Flesch, *The Art of Readable Writing* (rev. ed., Harper & Row 1974); Bryan A. Garner, *Securities Disclosure in Plain English* (CCH 1999); Robert Gunning, *The Technique of Clear Writing* (McGraw-Hill 1968); Christine Mowat, *A Plain Language Handbook for Legal Writers* (Carswell 1998); Thomas A. Murawski, *Writing Readable Regulations* (Carolina Academic Press 1999); Plain English Campaign, *Language on Trial: The Plain English Guide to Legal Writing* (Robson Bks. 1996); see also Kimble, *The Great Myth That Plain Language Is Not Precise*, in *Lifting the Fog of Legalese*, *supra* n. 16, at 37; Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 *Thomas M. Cooley L. Rev.* 1 (1992); Joseph Kimble, *A Plain English Primer*, 33 *Prac. Law.* 83 (1987); Wayne Schiess, *What Plain English Really Is*, 9 *Scribes J. Legal Writing* 43 (2003–2004).

Becoming a Consumer-Drafting Artist

A. *Steep Yourself in the Literature*

Read every legal-writing book you can get your hands on. Focus particularly on sources that discuss plain English or plain language. There are dozens. These books will do more than educate you — they will motivate you. You'll begin to feel strongly about the bad consumer drafting that is out there, and you'll want to do something about it.

I can't possibly list all the sources here, nor can I even list the best. I just want to mention the three people and the one book that have done the most to motivate me to improve consumer drafting.

1. *Rudolf Flesch*

I first noticed the name Flesch when I began using the readability scale that came with my word-processing software. A few years later I came across his book *How to Write Plain English: A Book for Lawyers and Consumers*.¹⁹ In it, Flesch explains his theories on readable writing, describes his Flesch readability scale, and discusses the work he did with the Federal Communications Commission in the 1970s, when he tried to help the FCC write more readable rules and regulations.

The best thing about the book is not the advice Flesch gives; it's not the stories he tells (though they're quite good). The best thing is his fervor for simple, readable writing. Flesch has absolutely no stomach for anything fancy, legalistic, or pompous. And his zeal is infectious.

¹⁹ Rudolf Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* (Harper & Row 1979).

Here's a taste. On the subject of using plain English all the time, not just when it's easy, Flesch says this about typical legal drafters:

Well, it's been my experience that lawyers are apt to use Plain English right up to the point where the going gets tough. Then they'll say, This idea is too complex — it can't be put into Plain English, no matter how hard you try. . . .

On that theory, you would draft a legal document, and just when the poor layman needed special help in understanding it, you would leave him in the lurch. . . .

So . . . [w]hen you come up against a roadblock like *default* or *security interest*, just try a little harder. It's up to you to meet the challenge.²⁰

Notice three things here:

- His tone and writing style are crisp, vigorous, and informal. His writing is easy to read. He's not just preaching about plain writing; he's doing it.
- He's an advocate, not just an objective conveyer of information. That's one reason the book is so good.
- The words he calls roadblocks, the words he says we must "try a little harder" to simplify, are *default* and *security interest*. These are hardly the dense legal jargon I was expecting him to rail against. These are words that most people know, aren't they? Anyway, these are words that most people could pick up easily, aren't they? And they are words that are "unsimplifiable terms of art,"²¹ aren't they? But Flesch says no. That's one thing a consumer drafting artist will love about Flesch: he believes we can simplify everything.

²⁰ *Id.* at 3–4.

²¹ Garner, *supra* n. 12, at 34.

If you're committed to consumer drafting, as I am, it couldn't hurt you to read anything Flesch wrote on the subject of writing, and he wrote a lot.²²

2. *David Mellinkoff*

In 1963, David Mellinkoff published *The Language of the Law*.²³ Although it might not sound like a plain-language book, it is. In the form of an exhaustively researched treatise on the history of legal English, it clears away countless myths about precision, complexity, and precedent in legal writing. The conclusion I came away with was that almost none of the complex, dense legalese in bad consumer drafting is necessary.

His second book, *Legal Writing: Sense and Nonsense*, contains more explicit support of clear, simple, direct writing. Because of his vast historical knowledge of legal language, Mellinkoff's recommendations carry great weight. When he says that bad legal writing comes from a history we can escape, I believe him:

The belief among writing lawyers that the ordinary English language is somehow inferior is an inheritance from the infancy of the common law and the infancy of modern English as a well organized language. Things have changed.

English is better now.²⁴

²² *The Art of Readable Writing* (Harper & Row 1974); *Rudolf Flesch on Business Communications: How to Say What You Mean in Plain English* (Barnes & Noble 1972); *The ABC of Style: A Guide to Plain English* (Harper & Row 1964); *How to Test Readability* (Harper & Bros. 1951).

²³ David Mellinkoff, *The Language of the Law* (Little, Brown & Co. 1963).

²⁴ David Mellinkoff, *Legal Writing: Sense and Nonsense* 62 (West 1982).

3. *Joseph Kimble*

Professor Kimble is one of the leading experts on plain legal language working today. Through a monthly column in the *Michigan Bar Journal* and in more than a dozen articles, he has tirelessly pushed forward the movement for clear legal writing in the United States — and abroad.

Like Mellinkoff and Flesch, he is zealous. Like them, he knows his stuff. And like them, he writes in a style that motivates and that sets an example for clear writing. Here he is introducing a piece he wrote that summarizes studies that prove the benefits of plain English. Think about what he is saying here, and apply it to consumer drafting (the italics are mine):

The literature contains studies about these benefits, but no one has ever collected and summarized the studies in a way that makes their full force apparent. As you read the summaries in this article, try to imagine the costs of poor writing — typified by officialese and legalese — in business, government, and law. *The costs are almost beyond imagining, and certainly beyond calculating.* If this evidence doesn't convince organizations and individual writers that plain language can change their fortunes, probably nothing will.²⁵

I think the aspiring consumer-drafting artist should read at least these three pieces by Kimble:

- Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 Thomas M. Cooley L. Rev. 1 (1992).

²⁵ Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 Scribes J. Legal Writing 1, 1 (1996–1997).

- Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 *Scribes J. Legal Writing* 1 (1996–1997).
- Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, in *Lifting the Fog of Legalese: Essays on Plain Language* 37 (Carolina Academic Press 2006).

4. *Writing Contracts in Plain English*

This book, written by Carl Felsenfeld and Alan Siegel and published in 1981, was the first comprehensive study of plain English in consumer documents. Although it's a bit dated, it laid important groundwork in document design, testing, and research.

The quotation that opened this piece is from Felsenfeld and Siegel, and carries a subtle message: to succeed at consumer drafting, you may have to think like an advertising copywriter: “Companies seeking expert advice in approaching a plain-language effort often rely on the same consultants who advise on consumer-product marketing. The two areas have their similarities.”²⁶ It's radical, but it's right.

B. *Learn the Basics of Document Design*

The consumer-drafting artist needs to know something about document design. Mainly, this requires an education in the document-design features that are holdovers from the era of the typewriter. There's no better text to study on this point than *The PC Is Not a Typewriter*,²⁷ by Robin Williams, a designer and author. If you catch the document-design bug, you may also want to read these two by Williams (and the same publisher):

²⁶ Felsenfeld & Siegel, *supra* n. 1.

²⁷ Robin Williams, *The PC Is Not a Typewriter* (Peachpit Press 1992).

- *The Non-Designer's Design Book: Design and Typographic Principles for the Visual Novice* (2d ed. 2003).
- *The Non-Designer's Type Book: Insights and Techniques for Creating Professional-Level Type* (2d ed. 2005).

Lawyers are behind on document design, but at least two recent articles have started to shed light on how we can improve our documents:

- Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108 (2004).
- Janeen Kerper, *Let's Space Out: Rethinking the Design of Law School Texts*, 51 J. Leg. Educ. 267 (2001).

C. *Change Your Mind About What Is "Legal"*

You're going to be hamstrung as a consumer drafter if you insist that text must "sound legal" to be legal. For example, I know lawyers who feel uncomfortable if they do not begin a motion with the phrase *COMES NOW PLAINTIFF* because "without that phrase, it doesn't look like a motion." Although I will grant the value of visual presentation — if a document looks like what it's "supposed" to be, the audience is more likely to accept it — what we are really talking about here is not rational reasoning. The *comes now* phrase is not required, adds nothing, and has even been shown to be disfavored by a large majority of judges.²⁸ Yet it "sounds legal."

Get past it. It's not whether the language sounds legal that matters; it's whether the language communicates the message to the reader.

²⁸ Kimble, *Strike Three for Legalese*, in *Lifting the Fog of Legalese*, *supra* n. 16, at 3, 4, 7.

But what about the solemnizing or ritual function of legal text? If the language is formal and legal-sounding, this argument goes, the average person will take it more seriously.²⁹ I have never seen any proof that this is true, and some legal-writing experts think it's overrated. For example, in his book *Legal Language*, Peter Tiersma says that "[e]ven though formal legal language may serve some purpose, we should ponder whether that goal might not be carried out just as well by some other means, one that does less injury to the goal of clear communication."³⁰ I, too, believe that the solemnizing or ritual function is overrated.³¹

I'll present more examples in the next subpart, but if you're going to succeed as a consumer drafter, you'll have to get used to seeing legal language like this:

- If I don't pay an entire payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment.³²
- We agree to build a partially completed house on your property, on the terms in Exhibits A, B, D, and the Limited Warranty. You agree to pay for the house. If two or more persons are signing this contract as buyers, we can collect all the payments from any one of you.³³

²⁹ See David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 Rutgers L.J. 713, 734 (2002).

³⁰ Peter M. Tiersma, *Legal Language* 102–03 (U. Chi. Press 1999).

³¹ Schiess, *supra* n. 18, at 69.

³² Texas Office of the Consumer Credit Commissioner, *Comparison of Traditional and Plain Language Clauses*, http://www.occc.state.tx.us/pages/Legal/plain_lang/PLcomp.htm (accessed Nov. 17, 2007).

³³ From a plain-English revision to a home-construction contract; I completed it in late 2004 for a home-construction company in Florida.

- Your children have to report income and deductions on their own returns, not on yours. But if they don't pay their taxes, it's up to you to pay them.³⁴

Notice the contractions, the use of the first- and second-person pronouns, the beginning of sentences with *But*, and the overall colloquiality of these texts. This is modern consumer drafting. It retains its legal effect, but it communicates that legal effect more clearly and directly than traditional legal drafting.

In fact, given the colloquiality of modern consumer drafting, I'm convinced that if you want to be a good consumer drafter, you might try this approach: orally describe the legal concepts to a teenager, transcribe that explanation, and revise to make it appropriate as written text. Frankly, I find it much harder to take a formal legal text and make it simple than to take an informal oral explanation and make it presentable as text. I don't have as far to go, and I don't get as hung up on the legal terminology. The truth is, what consumer drafters do is closer to speech than to most of the legal texts you're used to seeing and writing.

D. See What Others Are Doing

As you start to draft binding legal text aimed at the public, it's often helpful to see how others have addressed the challenge. Here are three places to look for good examples.

*1. The Texas Office of the Consumer Credit Commissioner*³⁵

The Texas OCCC legal staffers have been working on a plain-language project for a few years now, and they're doing some

³⁴ Flesch, *supra* n. 19, at 12.

³⁵ *Plain Language Project*, http://www.occc.state.tx.us/pages/Legal/plain_lang/index.html (accessed Nov. 17, 2007).

remarkable work. They have produced plain-language versions of several consumer-credit documents: secured-installment loans, signature loans, home-equity loans, home-improvement loans, and motor-vehicle-sales financing.

Visit the Before-and-After Samples page to get an idea of how far they've taken plain language, and then look at the full texts of the revised documents. You might be surprised. I know I was. Consider this excerpt from the Model Security Agreement:

If you take my collateral, you will tell me how much I have to pay to get it back. If I don't pay you to get the collateral back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. My right to get the collateral back ends when you sell it.³⁶

I consider this good consumer drafting, worthy of being emulated.

2. *The Federal Judicial Center's Illustrative Forms of Class-Action Notices*

My colleague Dr. Terri LeClercq worked as a consultant to the Federal Judicial Center in creating model class-action notices.³⁷ The original notices, which you've probably seen, tend to look like court pleadings and are often badly designed and confusingly written. You can see a full notice on the website, but this title to one notice ought to give you a flavor of the type of consumer drafting you'll find in the model notices:

³⁶ Texas Office of the Consumer Credit Commissioner, *Model Security Agreement*, http://www.occc.state.tx.us/pages/Legal/Laws/plain_lang/342Econtracts/342ESecurityAgreement.pdf (accessed Nov. 17, 2007).

³⁷ Terri R. LeClercq & Todd B. Hilsee, *The Federal Judicial Center's Model Plain Language Class Action Notices: A New Tool for Practitioners and the Judiciary*, 4 BNA Class Action Litig. Rpt. 182 (2003).

If you bought XYZ Corp. stock in 1999, you could get a payment from a class action settlement.³⁸

If this strikes you as being close to advertising copy, you're getting the right impression. It's designed to grab the reader's attention and communicate information quickly and easily. I think it succeeds.

*3. Clarity: Journal of the International Association
Promoting Plain Legal Language³⁹*

If you read this journal, you'll be seeing the cutting edge of plain legal language. Every issue is full of stories and examples of people working to convert legal documents into what I call consumer drafting. No aspect of legal drafting is too inconsequential; *Clarity* authors tackle them all.

For example, in one issue, *Clarity* contained pieces on these subjects:

- The use of initial capital letters for defined terms in a legal document. The author's position is that we should stop doing it, especially in "public documents" (consumer drafting).⁴⁰
- The use of numerals instead of text for numbers in all contexts (two articles — or should that be 2 articles?). One article⁴¹ was criticizing an earlier article that had

³⁸ The Federal Judicial Center's Illustrative Forms of Class Action Notices, *Securities Class Action Certification and Settlement: Publication Notice*, [http://www.fjc.gov/public/pdf.nsf/lookup/ClaAct14.pdf/\\$file/ClaAct14.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ClaAct14.pdf/$file/ClaAct14.pdf) (accessed Nov. 17, 2007).

³⁹ <http://www.clarity-international.net/journals/default.htm>.

⁴⁰ Richard Castle, *Definitions and Capitals: Where Are We?* *Clarity* No. 52, at 31 (Nov. 2004).

⁴¹ Richard Lauchman, *O Ate 2 of Jill'r Pairs*, *Clarity* No. 52, at 34 (Nov. 2004).

advocated legal drafters' using numerals in all contexts.⁴² The other article was a response⁴³ from the author of the first article.

Clarity is a wonderful resource for ideas that are pushing the boundaries of what counts as legal drafting.

E. Get Used to "You"

In the consumer-drafting work I have done, one technique more than any other has helped smooth the way, even through the densest legalese: using the word *you*. If you are willing to stop referring to the *buyer*, the *ticketholder*, the *user*, the *debtor*, the *borrower*, and many others, you will make huge strides in becoming a consumer-drafting artist. Simply refer to the person as *you*:

By using this ticket, you agree that you will not broadcast any descriptions or pictures of the game. If you do, we can remove you from the event.

With this approach, the other party, usually the drafter of the document, is often called *we*. To me, this approach makes sense because the document speaks to the reader, the consumer. It's as if the other party, usually an entity with greater bargaining power, is prescribing the terms.

Flesch called this usage "the indispensable *you*,"⁴⁴ and he believed that when we avoid using *you*, we make our text "stiff and impersonal."⁴⁵ Now, some legal drafters might say they don't care if a drafted document feels stiff and impersonal. It's not a letter or a

⁴² Robert Eagleson, *Numbers: Figures or Words?* *Clarity* No. 50, at 32 (Nov. 2003).

⁴³ Robert Eagleson, *The Doleful Grip of Convention*, *Clarity* No. 52, at 37 (Nov. 2004).

⁴⁴ Flesch, *supra* n. 19, at 44.

⁴⁵ *Id.* at 45.

brief, after all. That's a good point. But even though legal drafting is usually devoid of a writer's voice,⁴⁶ using *you* makes the text more direct; the reader feels the impact of the language more immediately, and that's not only appropriate but desirable for consumer drafting.

Using *you* for the consumer is not the universal approach of consumer drafters. As you might have noticed in the Texas OCCO examples, some drafters prefer to call the consumer *I* and refer to themselves (the person or entity drafting the document) as *you*. With this approach, the document speaks as if the consumer were speaking, making promises and declaring his or her rights and duties. This approach, too, highlights the immediacy and seriousness of the obligations that the consumer is undertaking.

But I prefer the *you* approach because it presents a more realistic scenario to the consumer's mind. The document is saying, "You, the consumer, are to abide by these terms, provided by us, the entity that drafted this document." That reflects reality. When the document speaks in the consumer's voice, it's as if the consumer created the document and its terms and is telling the other party about them. That seems contrived to me.

Still, both approaches are used in consumer drafting, and both rely on *you* in one sense or another.

F. Seek and Accept Testing, Suggestions, and Criticism

Painful as it can be, your consumer drafting will improve if you subject it to testing and criticism. All types of writing will, in fact.⁴⁷ In consumer drafting, though, think of it as getting to know your consumer audience and what they like and dislike.

⁴⁶ Kimble, *How to Mangle Court Rules and Jury Instructions*, in *Lifting the Fog of Legalese*, *supra* n. 16, at 118.

⁴⁷ Garner, *supra* n. 12, at 137.

I subject my drafts to testing and criticism in two ways.

First, I have a friend or relative read the text and give me comments. This is the easiest way to get feedback, but often the least effective. It's ineffective when the reader won't be candid or assumes that something hard to understand is just necessary legal jargon. I've worked hard to get my spouse to tell me the truth about a piece of writing — whether it seems too hard for a typical nonlawyer. I've convinced her that I really want to know *every* problem with the text. This reality check has become an important part of my consumer drafting.

Second, I do some testing of the text on others. Usually I prepare a text and e-mail it to a list of people I know. I ask targeted questions about the meaning. Sometimes I present before-and-after versions and ask for a preference. Sometimes I simply ask for a reaction to a text. It's almost always very helpful.

At least two experts have written useful advice on testing legal documents intended for the public. In *Plain Language for Lawyers*, Michèle Asprey makes a strong case for testing plain-language revisions.⁴⁸ And Christine Mowat offers several possible testing methods in her book *A Plain Language Handbook for Legal Writers*.⁴⁹

Conclusion

I used the things I've learned on a large consumer-drafting project in the fall of 2004. I was hired by a home-building company to redraft several lengthy documents into plain English. The documents were a construction contract, a loan agreement, a

⁴⁸ Michèle M. Asprey, *Plain Language for Lawyers* 288–305 (3d ed., Fedn. Press 2003).

⁴⁹ Mowat, *supra* n. 18, at 41–51.

promissory agreement, a deed of trust (mortgage), and various exhibits to these documents. I hope to detail that project in another article soon.

It was hard work, which required a knowledge of several things I didn't discuss in this article: words of authority, use of the passive voice, legal archaisms, grammar, punctuation, and legal usage. But even more than those academic principles and more than sentence length and vocabulary, what served me best on the project were the principles discussed here under the heading "Becoming a Consumer-Drafting Artist."

