

1-1-1987

# Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing

Robert W. Benson

Joan B. Kessler

---

## Recommended Citation

Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loy. L.A. L. Rev. 301 (1987).

Available at: <http://digitalcommons.lmu.edu/llr/vol20/iss2/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# LEGALESE V. PLAIN ENGLISH: AN EMPIRICAL STUDY OF PERSUASION AND CREDIBILITY IN APPELLATE BRIEF WRITING\*

*Robert W. Benson\*\*  
and Joan B. Kessler\*\*\**

## I. OVERVIEW

This Article reports the first empirical research on the effectiveness of different prose styles in appellate briefs. Appellate judges and their research attorneys were asked to assess passages from briefs written in traditional legal prose or "legalese."<sup>1</sup> Other judges and research attorneys in the same court were asked to assess the same passages rewritten in "plain English."<sup>2</sup> By statistically significant margins, the respondents rated the passages in legalese to be substantively weaker and less persuasive than the plain English versions. Moreover, they inferred that the

---

\* Copyright by Robert W. Benson and Joan B. Kessler, 1986.

\*\* Professor of Law, Loyola Law School, Los Angeles, California; A.B. 1964, Columbia College; J.D. 1968, University of California, Berkeley.

\*\*\* Law clerk, Frandzel & Share, Los Angeles, California; B.A. 1967, University of Michigan; M.A. 1969, University of California, Los Angeles; Ph.D. 1973, University of Michigan; J.D. 1986, Loyola Law School, Los Angeles. Ms. Kessler was an Associate Professor of Speech Communication at California State University, Northridge, when this Article was accepted for publication.

This project was completed with research funds from Loyola Law School, Los Angeles. The authors wish to thank Professor William Eadie, Chair, Department of Speech Communication, California State University, Northridge, and Professor David Mellinkoff of the University of California, Los Angeles, Law School, for insightful comments as this project developed. We also wish to thank Dr. Rudolf Flesch, and Professor George R. Klare of the Department of Psychology, Ohio University, for helpful comments on the final draft. The advice of Presiding Justice Robert Feinerman and research attorney Joanne Victor was especially valuable for the research done at the California Court of Appeal (Second District) in Los Angeles. Mr. Noshir Contractor, a graduate student at the Annenberg School of Communication, University of Southern California, was very helpful in the statistical analysis of the t-test data. Finally, the authors thank all the justices and research attorneys who took part in the study project.

1. For a definition of legalese and an analysis of its linguistic features, see Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 522-27 (1985).

2. For the principles of plain English, see R. FLESCH, *HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS AND CONSUMERS* (1979); R. GOLDFARB & J. RAYMOND, *CLEAR UNDERSTANDINGS: A GUIDE TO LEGAL WRITING* (1982); R. LANHAM, *REVISING PROSE* (1979); R. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (1985).

attorneys who wrote in legalese possessed less professional prestige than those who wrote in plain English.

The study thus suggests an answer to one of the questions left unresolved by the recent surge of research on legal language:<sup>3</sup> whether there is any disadvantage for an attorney to use traditional legalese when writing for judges. Empirical research has previously demonstrated that persons who are not lawyers generally cannot understand jury instructions,<sup>4</sup> consumer contracts,<sup>5</sup> consent-to-surgery forms<sup>6</sup> or statutes.<sup>7</sup> In addition, readability formulas have repeatedly predicted that persons of average education will not be able to comprehend voters' pamphlets,<sup>8</sup> ballot propositions,<sup>9</sup> statutes,<sup>10</sup> standard contract forms,<sup>11</sup> trust clauses,<sup>12</sup> government notices<sup>13</sup> or other typical legal documents for consumers.<sup>14</sup> Moreover, these predictions are corroborated by the recurrent failure of such documents to communicate clearly when put into practical use.<sup>15</sup> It seems evident that the cause of the incomprehension is the legal language in which the documents are written. Empirical studies have shown that each of the principal linguistic peculiarities of legalese causes confusion.<sup>16</sup> When the peculiarities are removed, comprehension increases.<sup>17</sup>

All of this research constitutes the backbone of an international movement in which legislatures are requiring consumer documents to be written in plain English,<sup>18</sup> and in which lawyers and writing consultants

3. For a comprehensive bibliography of research on the relationships between law and language, see J. Levi, *Linguistics, Language, and Law: A Topical Bibliography* (1982) (Department of Linguistics, Northwestern University, Illinois).

4. Benson, *supra* note 1, at 540-47; see also A. ELWORK, B. SALES & J. ALFINI, *MAKING JURY INSTRUCTIONS UNDERSTANDABLE* (1982); Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979).

5. Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841 (1977).

6. Benson, *supra* note 1, at 540-44.

7. *Id.*

8. D. Magleby, *Voter Pamphlets: Understanding Why Voters Don't Read Them* (Sept. 3-6, 1981) (unpublished paper prepared for delivery at the 1981 annual meeting of the American Political Science Association, New York City).

9. *Id.* at 84.

10. Benson, *supra* note 1, at 555-56.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 532-37; see D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 290-398 (1963).

16. AMERICAN INSTITUTE RESEARCH, *GUIDELINES FOR DOCUMENT DESIGNERS* (1981).

17. Benson, *supra* note 1, at 540-44; see also A. ELWORK, B. SALES & J. ALFINI, *supra* note 4; Charrow & Charrow, *supra* note 4; Davis, *supra* note 5.

18. Benson, *supra* note 1, at 571-73; see also PRACTICING LAW INSTITUTE, *DRAFTING*

are showing others how to write clearly without sacrificing legal accuracy.<sup>19</sup> It is now undeniable that lawyers run great risks if they write consumer documents in legalese.<sup>20</sup> The present study concludes that lawyers may also run great risks if they use legalese when writing documents intended only for judges.

It is perhaps not surprising that this study reinforces an extensive body of subjective literature in which judges, legal scholars and practicing attorneys have long advised brief writers to adhere to the principles of plain English.<sup>21</sup> The study also tends to refute the skepticism which holds that judges may preach plain English but are persuaded by legalese.<sup>22</sup> Though the skepticism could be appropriate to some individual judges, the evidence presented in this study suggests that judges and their research attorneys do in fact assess plain English briefs, and the lawyers who write them, more favorably.

---

DOCUMENTS IN PLAIN LANGUAGE (1979); Winter, *Legalese, Bafflegab and Plain Language Law*, 4 CANADA COMMUNITY L.J. 5 (1980); Note, *A Model Plain Language Law*, 33 STAN. L. REV. 255 (1981); *Plain English in the Law*, 62 MICH. B.J. 941 (1983); *British Consider A Plain Language Law*, SIMPLY STATED, Oct. 1984, at 1; *Advice From Australia's Plain English Adviser*, SIMPLY STATED, May-June, 1985, at 1; Redish, *The Plain English Movement*, reprinted in *THE ENGLISH LANGUAGE TODAY: PUBLIC ATTITUDES TOWARD THE ENGLISH LANGUAGE* (S. Greenbaum ed. in press).

19. See, e.g., AMERICAN INSTITUTE RESEARCH, *supra* note 16; C. FELSENFELD & A. SIEGEL, *SIMPLIFIED CONSUMER CREDIT FORMS* (1978 & Supp. 1981); C. FELSENFELD & A. SIEGEL, *WRITING CONTRACTS IN PLAIN ENGLISH* (1981); R. FLESCHE, *supra* note 2; R. GOLDFARB & J. RAYMOND, *supra* note 2; D. MELLINKOFF, *LEGAL WRITING: SENSE & NON-SENSE* (1982); NLRB, *STYLE MANUAL* (1983); PRACTICING LAW INSTITUTE, *supra* note 18; UNITED STATES OFFICE OF FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK (1980); UNITED STATES OFFICE OF FEDERAL REGISTER, *LEGAL DRAFTING STYLE MANUAL* (1978); R. WYDICK, *supra* note 2; *Plain English in the Law*, *supra* note 18; Cusack, *The Plain English Will Revisited*, TRUSTS & ESTATES, July 1980, at 42-43.

20. Benson, *supra* note 1, at 571-73.

21. See, e.g., E. RE, *BRIEF WRITING AND ORAL ARGUMENT* (1974); M. ROMBAUER & L. SQUIRES, *LEGAL WRITING* (1982); H. WEIHOFEN, *LEGAL WRITING STYLE* (1961); Alterman, *Plain and Accurate Style in Lawsuit Papers*, 2 THOMAS COOLEY L. REV. 243 (1984); Griffith, *Effective Brief Writing*, 16 FORUM 460 (1980); Ottesen, *Effective Brief-Writing for California Appellate Courts*, 21 SAN DIEGO L. REV. 371 (1984). See also the following articles collected in *ADVOCACY AND THE KING'S ENGLISH* (G. Rossman ed. 1960): Appleman, *Tactics in Appellate Briefs* 440; Chafee, *The Disorderly Conduct of Words* 619; Dore, *Expressing the Idea—The Essentials of Oral and Written Argument* 810; Gerhart, *Improving Our Legal Writing: Maxims from the Masters* 765; Rutledge, *The Appellate Brief* 429; Selvin, *The Form and Organization of Briefs* 405.

22. In an analogous field, one study suggests that such skepticism may be warranted. Researchers found that a group of college English teachers gave higher grades to papers with syntactically complex writing than to papers written simply. The researchers inferred that the writers of simpler prose may have been perceived as naive and less intellectual than the writers of the complex prose. Hake & Williams, *Style and Its Consequences: Do as I Do, Not as I Say*, 43 C. ENG. 433 (1981).

## II. HYPOTHESIS TESTED

The study of persuasion, or of why one message source is more believable or acceptable than another, has its roots in the fourth century B.C.<sup>23</sup> Aristotle used the term "ethos" to describe the speaker's good sense or intelligence, good moral character, and good will toward the audience.<sup>24</sup> He said that if a speaker had a high level of ethical appeal, the persuasive impact of the speaker's message would be heightened "apart from the proof" used as support.<sup>25</sup> Although researchers have expanded Aristotle's definition of credibility,<sup>26</sup> there is still agreement that credibility, along with factors such as number of arguments and message comprehensibility, affects persuasion.<sup>27</sup>

The anecdotal reports of lawyers, judges and legal scholars support the supposition that these factors are at work in legal persuasion.<sup>28</sup> One experienced trial judge sitting temporarily on the California Court of Appeal wrote: "I read briefs prepared by very prominent law firms. I bang my head against the wall, I dash my face with cold water, I parse, I excerpt, I diagram and still the message does not come through. In addition, the structural content is most often mystifying."<sup>29</sup>

On the other hand, a California Court of Appeal justice involved in this study discounted the weight of such factors and wrote to us when the study was over:

That a decent writing style is appreciated by a busy jurist is

23. S. TUBBS & S. MOSS, *HUMAN COMMUNICATION* 282 (1983).

24. R. APPLBAUM & K. ANATOL, *STRATEGIES FOR PERSUASIVE COMMUNICATION* 66 (1974).

25. *Id.*

26. Various components have been related to source credibility, including trustworthiness, expertise, dynamism, and sociability. *Id.* at 67.

27. See E. BETTINGHAUS & M. CODY, *PERSUASIVE COMMUNICATION* (1987) for a detailed discussion of recent research into what constitutes effective persuasion. Bettinghaus and Cody explain how various factors leading to persuasion are identified by factor analysis. *Id.* at 84-86. This procedure of clustering various survey questions into factors will be discussed in the Analysis section of this Article. See R. PETTY & J. CACIOPPO, *ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES* 70, 77 (1981) for a discussion of the effect of number of arguments, order of arguments, and message comprehensibility. One study investigated the impact on comprehension of a message heard by one group in a "reasoned sequence of arguments," while another group heard the message with the sentences cut in half and put back together randomly. Although the second version was created so it appeared to make sense, the first group of subjects was more persuaded than the second group. Eagly, *Comprehensibility of Persuasive Arguments as a Determinant of Opinion Change*, 29 *J. PERSONALITY & SOC. PSYCHOLOGY* 758 (1974).

28. See *supra* note 21.

29. Letter from Los Angeles Superior Court Judge Ronald E. Swearingner (temporarily sitting on Cal. Ct. App.) to Robert W. Benson (Oct. 15, 1984) (available at Professor Benson's office, Loyola Law School).

self-evident. However, the suggestion that appeals are “won” or “lost” thereby, is a conceit I am loathe to see further encouraged. Only its facts and its intrinsic worth should determine a cause’s outcome, and I believe they usually do. An advocate *cannot produce merit*, at best he merely directs the court’s attention to it, thereby sparing the judge and his staff the need to ferret it out themselves.<sup>30</sup>

In this study we took no position on whether appeals are actually “won” or “lost” on the basis of writing style alone. We merely hypothesized, on the basis of existing empirical and experiential literature, that writing style would influence the judicial decisionmakers’ perceptions of a brief’s substantive quality and persuasiveness, as well as their perceptions of the attorney’s professional credentials. The hypothesis was borne out by the evidence gathered.

### III. METHOD

#### *Research Setting*

Data for this study were collected during a two-week period in April 1985 by one of the researchers who was working as an extern at the California Court of Appeal (Second District) in Los Angeles. The location was chosen because of the researcher’s access to subjects and the willing cooperation of many justices and their staffs.

#### *Subjects*

From a potential pool of sixty-five research attorneys and twenty-eight justices,<sup>31</sup> thirty-three research attorneys and ten justices were selected on the basis of availability and willingness to participate. Research attorneys are aides employed by the justices to help them research and analyze the cases that come to court. Among other activities, they read the briefs submitted by the parties and prepare written evaluations of them for the justices. Their influence in the judicial decisionmaking

---

30. Letter from California Court of Appeal Justice Donald N. Gates to Robert W. Benson (June 12, 1985) (available at Professor Benson’s office, Loyola Law School).

31. One justice and three research attorneys were excluded from the sample because of their close work relationship with the researcher. The number of justices includes justices pro tem and the number of research attorneys includes attorneys working as career attorneys, two year appointees, and central staff attorneys. All of the subjects used in this study were regularly involved in reading and evaluating briefs, writing memos regarding opinions or actually writing opinions.

process can be significant.<sup>32</sup>

The subjects were randomly given either "legalese" segments of two different passages or rewritten "plain English" segments. There were twenty-one female and twelve male research attorneys in the sample. Legalese versions were given to nine females and six males, while plain English versions were given to twelve females and six males. The versions were divided equally among the two female and eight male justices in the sample.<sup>33</sup> All subjects were given the same written instructions<sup>34</sup> and there were no additional oral instructions.

The researcher handed all questionnaires to the subjects and left them alone to read the segments and fill in the answers. No time limit was imposed. When collecting the questionnaires, the researcher told the subjects that she would discuss the project after all questionnaires were returned. At the conclusion of the project, many of the subjects shared anecdotes with the researcher about having received poorly written appellate briefs in the past. Subjects were debriefed by memorandum when the results had been tabulated and analyzed.<sup>35</sup>

### *Materials*

Two segments from actual documents filed in court by attorneys were used for the legalese versions.<sup>36</sup> These were then rewritten in plain English.

The segments were short because we feared we would be unable to find subjects who would volunteer to spend time reading longer passages. We have no strong reason to believe that the brevity of the segments significantly affected the results of the study.<sup>37</sup>

---

32. See generally J. OAKLEY & R. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* (1980).

33. This sample was consistent with the proportion of males and females in the pool generally. At the time this study was conducted, there were 4 female and 24 male justices, while there were 43 female and 22 male research attorneys.

34. See Appendix I.

35. See Appendix II.

36. One segment was a portion of an actual brief previously found by the author of a law review article and used as a sample of poor writing. See Ottesen, *supra* note 21, at 377. The other segment was taken from an actual petition for rehearing submitted within the last few years to the California Court of Appeal. We prefer not to embarrass its author by identifying the document further.

37. One respondent commented that the segments were so short and devoid of contextual meaning that it was impossible to judge their authors as more persuasive or credible than others. While this may have been the case for that respondent, that view would be reflected in the statistical results for the group. The results as a whole demonstrate that the group did in fact draw significantly different conclusions about the two versions of the short segments.

Another objection may be that this experiment established certain conclusions only about

The first legalese segment, which we numbered 101, was an argumentative heading or "headnote" taken from an appellate brief. It is classical style in American brief writing to employ headnotes both to identify the legal structure of the argument and to persuade. The segment reads as follows:

#### APPELLATE BRIEF

The trial court erred in giving flawed essential elements instructions to the jury and thereby denied the defendant due process and fundamental fairness since it is error to give the jury, within the essential elements instructions, one statement containing more than one essential element of the crime and requiring of the jury simple and singular assent or denial of that compound proposition, fully capable of disjunctive answer, which if found pursuant to the evidence adduced would exculpate the defendant.

This headnote displays numerous characteristics of legalese that have been identified in the linguistic literature:<sup>38</sup>

- Very long, complex sentence with many embedded clauses:<sup>39</sup> The entire segment, in fact, is a seventy-nine word sentence.

- Misplaced phrases:<sup>40</sup> Phrases that seem awkward and out of place in the segment are *in giving flawed essential elements instructions, within the essential elements instructions, containing more than one essential element, requiring of the jury, fully capable of disjunctive answer, if found pursuant to evidence adduced.*

- Wordy:<sup>41</sup> Extra words are used to express even simple ideas. *Due process and fundamental fairness, simple and singular, fully capable of disjunctive answer, pursuant to the evidence adduced.*

- Long words:<sup>42</sup> The author of the segment has a knack for words of three or more syllables such as *essential, elements, instructions, funda-*

---

short segments, and it does not necessarily follow that the same conclusions can be drawn about full-length appellate briefs. We doubt that this objection is sound, although to actually demonstrate that it is unsound would require another study using full-length briefs. The segments used in this study were typical of the prose in full-length briefs. The most reasonable inference is that the readers' assessments would simply be reinforced if they were given more of the same in longer documents.

38. See Benson, *supra* note 1, at 522-27.

39. *Id.* at 524.

40. *Id.*

41. *Id.*

42. *Id.* at 523.



*mental, containing, requiring, singular, proposition, disjunctive, pursuant, and exculpate.*

- Terms of art:<sup>43</sup> Terms of art in the segment are *due process, defendant, and essential elements.*

- Argot:<sup>44</sup> Professional slang in the segment includes *erred* and *fundamental fairness.*

- Doublets:<sup>45</sup> *due process and fundamental fairness, simple and singular.*

- Old English:<sup>46</sup> *thereby.*

- Absence of pronouns:<sup>47</sup> Use of relative pronouns *that* or *which*, accompanied by changes in the verb forms, would have helped clarify the phrases *statement containing, requiring of the jury, and fully capable.*

- Too many ideas in each sentence:<sup>48</sup> There are at least thirteen individual legal concepts embedded in the single sentence of the segment.

- Appearance of extreme precision:<sup>49</sup> The layering of at least thirteen individual concepts within a lengthy, syntactically complex sentence gives the appearance of great precision. In reality, both concepts and syntax are awkward and imprecise.

- Pompous and dull tone:<sup>50</sup> Portions of the segment recall Charles Dickens' parodies of judicial language of the nineteenth century. Among these is *simple and singular assent or denial of that compound proposition which if found pursuant to the evidence adduced would exculpate the defendant.*

- Poetic devices:<sup>51</sup> Alliteration and rhythm can be noted in phrases like *thereby denied the defendant due process and fundamental fairness, essential element of the crime, simple and singular assent.* While poetic devices in legal language may charm linguists, as a practical matter they lend an air of strangeness and magic to the language which impedes communication.

Segment 101 was rewritten in plain English by omitting most of the legalese features listed above:

---

43. *Id.*

44. *Id.*

45. *Id.* at 524.

46. *Id.* at 523.

47. *Id.* at 525.

48. *Id.*

49. *Id.* at 526.

50. *Id.*

51. *Id.* at 526-27.

## APPELLATE BRIEF

The trial judge erred by instructing the jury to affirm or deny a single question which contained more than one essential element of the crime. By joining all of the major elements, the court denied the defendant his due process right to be acquitted if found innocent of any one of the elements.

Note that the revision has two sentences of only twenty-five and twenty-eight words. The total length of fifty-three words is thirty-three percent shorter than the original. We kept the three terms of art. We added "affirm," "deny" and "acquitted." Nevertheless, our version was not quite as well received by the respondents as we had expected.<sup>52</sup>

The second legalese segment, which we numbered 103, was a paragraph extracted from a petition for rehearing:

## PETITION FOR REHEARING

Needless to say, we disagree with much that is set forth in the Court of Appeal's *Opinion* herein. Nevertheless, this *Petition for Rehearing* is restricted to but a single aspect of the said *Opinion*. This single aspect is the one which pertains to that ratification of an act of his agent which is submitted to flow from the facts as represented by Mr. Jones to the Superior Court (*Opinion*: page 4, line 2 to page 5, line 2, page 11, line 7 to page 12, line 19). Specifically, we respectfully submit that the Court of Appeal's views relative to the assumed non-existence of such ratification, are predicated upon a factual assumption which is disclosed by the *record* to be *incorrect*. This being so, we submit that the *actual facts*, revealed by the *record*, are such as clearly to entitle us to prevail in respect of the ratification *theory*.

A petition for rehearing is technically different from a brief but, in

---

52. In commenting on the draft of this paper, Dr. Rudolf Flesch has suggested a clearer version:

The trial judge erred by instructing the jury to answer yes or no to a single question that contained more than one essential element of the crime. By joining all the major elements together in one question, the judge denied the defendant due process. He had a right to be freed if the jury found him innocent of any one element.

Letter from Rudolf Flesch to Robert W. Benson (Dec. 18, 1985) (available at Professor Benson's office, Loyola Law School). This version (totalling 61 words) would have put the passage into the "Plain English" bracket on Flesch's Readability Scale. See R. FLESCHE, *supra* note 2.

ways relevant to this study, it is the functional equivalent. This segment displays numerous typical features of legalese, though not always the same ones as segment 101.

- Sentence length:<sup>53</sup> Four of the five sentences in the segment were short, but one, at fifty-three words, was probably too long for easy comprehension.

- Wordy:<sup>54</sup> The paragraph has an extraordinary number of words which do not do much work, particularly adverbs, prepositions and relative clauses. Some of the extra words are *needless to say, that is set forth, herein, nevertheless, but a single aspect of, said, the one which pertains to that, which is submitted, specifically, relative to the assumed, are such as clearly to, and in respect of the.*

- Misplaced phrases:<sup>55</sup> The accumulation of prepositional phrases in the third sentence is especially confusing: *the one which pertains to that ratification of an act of his agent which is submitted to flow from the facts as represented by Mr. Jones to.*

- Long words:<sup>56</sup> *nevertheless, restricted, ratification, submitted, represented, specifically, respectfully, relative, non-existence, predicated, assumption.*

- Terms of art:<sup>57</sup> *ratification, record, opinion, agent, petition for rehearing.*

- Argot:<sup>58</sup> *set forth in the Court of Appeal's Opinion, respectfully submit, disclosed by the record, entitle us to prevail.*

- Old English:<sup>59</sup> *herein, said.*

- Pompous tone:<sup>60</sup> The one phrase *respectfully submit* is not sufficient to overcome the pomposity of *needless to say, to but a single aspect and clearly to entitle us to prevail.*

- Bizarre graphics:<sup>61</sup> Frequent capitalization and underscoring, as well as the cumbersome use of unneeded numerals to cite lines, give this paragraph a distracting, if lively, visual appearance.

- Nominalizations:<sup>62</sup> *ratification, non-existence, assumption.*

---

53. Benson, *supra* note 1, at 524.

54. *Id.*

55. *Id.*

56. *Id.* at 523.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 526.

61. *Id.* at 527.

62. *Id.* at 524.

- Passives:<sup>63</sup> *is restricted, is the one which, ratification of an act, is submitted to flow, as represented by, are predicated upon, which is disclosed by the record to be, revealed by the record, are such as clearly to entitle us to prevail.*

In rewriting segment 103 in plain English, we eliminated most of the legalese features identified above:

#### PETITION FOR REHEARING

Although we disagree with much of the Court of Appeal's opinion, we limit this Petition for Rehearing to a single aspect: The question of whether Mr. Jones ratified the act of his agent. The Court found that he did not (*Opinion*, pp. 4-5, 11-12). We respectfully submit that this finding was based upon a misreading of the facts. The Court assumed facts that were clearly contrary to those in the trial record which pointed to ratification. We are, therefore, entitled to a rehearing.

In this version, we cut fully forty-four percent of the words, shortened all sentences, simplified the graphics and made the tone straightforward and sincere. We retained the terms of art and, in an excess of caution, even retained the argot *respectfully submit*. We also cautiously retained the attorney's opening statement of disagreement "with much" of the Court's opinion, though the statement might be construed as counter-persuasive.

#### *Questionnaire*

The respondents were asked to fill in the following questionnaire after reading one of the segments above:

---

63. *Id.*

We are currently conducting a study of brief writing. We would appreciate your response to this anonymous questionnaire.

Directions: For the following statements please circle the answer that best reflects your assessment of the previous passage or its author.

- If you:           STRONGLY AGREE       - circle SA  
 If you:           AGREE                       - circle A  
 If you are:       NEUTRAL                     - circle N  
 If you:           DISAGREE                   - circle D  
 If you:           STRONGLY DISAGREE       - circle SD

Please respond to the following items about the previous paragraph.

1. SA A N D SD    I believe the lawyer used poor word choice.
2. SA A N D SD    The writer is convincing.
3. SA A N D SD    The writing is vague.
4. SA A N D SD    The writing is concise and specific.
5. SA A N D SD    I am persuaded by this excerpt.
6. SA A N D SD    The writer is uncreative.
7. SA A N D SD    Judging from this excerpt, I believe the writer is an emotional person.
8. SA A N D SD    The writer is a competent person.
9. SA A N D SD    The writer is a well educated person.
10. SA A N D SD   The writer is an unpersuasive person.
11. SA A N D SD   The writer is a scholarly person.
12. SA A N D SD   The writer is associated with a prestigious law firm.
13. SA A N D SD   The writer is an ineffective appellate advocate.
14. SA A N D SD   The writer is a successful lawyer.
15. SA A N D SD   I believe the lawyer is naive.
16. SA A N D SD   The writer is a dynamic person.
17. SA A N D SD   The writer is an honest person.
18. SA A N D SD   The writer is the kind of person I would believe.
19. SA A N D SD   I believe the writer is a powerful person.
20. SA A N D SD   This person is logical.
21. SA A N D SD   The writing is easy to comprehend.
22. SA A N D SD   The writing is ambiguous.

## IV. ANALYSIS AND DISCUSSION

Responses to the twenty-two individual measures were compared for the legalese versus revised passages (Table I). The agreement scale on the original questionnaires was converted into a five-point scale; 5 represented "strongly agree" while 1 represented "strongly disagree."<sup>64</sup>

We varied the question direction (positive or negative) to prevent subjects from circling all high or low numbers. This is a common research practice used to control subjects who circle all high or low numbers without carefully reading each statement. In order to run statistical tests on these data, all of the items were rephrased in the negative. For instance, in item 21, "the writing is easy to comprehend" became "the writing is incomprehensible" for uniformity of analysis.

Table I displays the mean or average response of all subjects to each item. The t-test values indicate statistical differences between the legalese segment mean and the revision mean. This statistical test determines whether the observed differences reflect real differences or merely chance occurrences.<sup>65</sup>

As Table I shows, the legalese version of the appellate brief segment was significantly more likely to be labeled unconvincing and unpersuasive, from a non-prestigious firm, or from an ineffective appellate advocate. It was also more likely to be labeled unbelievable and incomprehensible than was the plain English version. The plain English ver-

---

64. See M. HENERSON, L. MORRIS & C. FITZ-GIBBON, *HOW TO MEASURE ATTITUDES* 86 (1978). This type of scale measures the intensity of an attitude. Items for this scale were developed by the researcher using models from two studies: Eadie, Komsky & Krivonos, *Credibility and Distortion in a University Collective Bargaining Campaign*, 12 J. APPLIED COMMUNICATION RESEARCH 103 (1984); and McCroskey, *Scales for the Measurement of Ethos*, 33 SPEECH MONOGRAPHS 65 (1966).

65. The hypothesis in this study predicted differences between the revised versus the convoluted writing. The direction of these differences was also predicted. The revised version and its author were predicted to be perceived as more credible and persuasive. Only a hypothesis of no difference (the null hypothesis) can be statistically tested. Once this null hypothesis is tested, the results may be evaluated in terms of the predicted hypothesis. Data are collected to test the null hypothesis. When differences are observed, statistical tests such as a t-test determine whether the observed differences reflect real differences or merely chance occurrences.

In the present study the probability level set as a criterion for rejection of a null hypothesis was .05. This means that if the probability of chance occurrence is greater than five in one hundred, these observed differences cannot conclusively be said to be true differences, and therefore the null hypothesis can be rejected.

Even if the level of statistical significance is not met, this does not mean that this finding cannot still be examined as an interesting direction to consider. On Table I some differences went beyond the .05 level and were significant at the .01 or .001 levels, indicating even greater credibility of results. A negative t-value indicates that the results were contrary to the direction hypothesized. For a more detailed discussion of statistical significance and the t-test, see F. WILLIAMS, *REASONING WITH STATISTICS* 51-77 (1979).

**TABLE I**  
**t-TEST RESULTS FOR EACH INDIVIDUAL QUESTION**

Variable	Appellate Brief				Petition for Rehearing			
	Means		T-Value		Means		T-Value	
	Legalese	Plain English			Legalese	Plain English		
1. Poor word choice	4.40	4.17	+0.84		4.00	2.43		+4.65***
2. Not a convincing writer	4.47	3.78	+2.63**		4.05	2.83		+4.38***
3. Vague writing	4.05	3.91	+0.40		3.89	2.35		+5.19***
4. Writing not concise or specific	4.75	4.36	+1.93		4.05	2.69		+3.61***
5. Unpersuasive writing	4.60	3.96	+2.47*		4.15	3.39		+3.24***
6. Uncreative person	3.30	3.45	-0.44		3.50	2.86		+2.25*
7. Emotional person	2.80	2.69	+0.55		3.05	2.96		+0.44
8. Not a competent person	3.50	3.09	+1.42		3.15	2.68		+1.77
9. Not well educated person	2.95	3.05	-0.35		3.05	2.64		+1.80
10. Unpersuasive person	3.90	3.55	+1.39		3.45	2.72		+2.64
11. Unscholarly person	3.50	3.50	0.00		3.55	2.91		+2.64***
12. Not from prestigious firm	3.50	3.14	+2.02*		3.45	2.86		+3.04**
13. Ineffective appellate advocate	4.20	3.65	+2.15*		3.25	2.47		+2.42**
14. Unsuccessful lawyer	3.35	3.09	+1.51		3.15	2.86		+1.76
15. Naive lawyer	3.05	3.13	-0.35		3.05	2.91		+0.67
16. Not a dynamic person	3.50	3.14	+1.77		3.25	3.09		+0.83
17. Dishonest person	3.00	2.95	+0.42		3.00	3.04		-0.42
18. Unbelievable person	3.45	3.09	+2.06		3.25	3.09		+0.96
19. Not a powerful person	3.55	3.41	+0.64		3.50	3.09		+2.34*
20. Illogical person	3.80	3.45	+1.06		3.10	2.63		+1.45
21. Incomprehensible writing	4.80	4.21	+2.66***		3.95	2.17		+5.59***
22. Ambiguous writing	4.30	3.83	+1.44		3.74	2.30		+4.32***

\* Significant at less than .05 level

\*\* Significant at less than .01 level

\*\*\* Significant at less than .001 level

The other results were not statistically significant.

sion, though much more favorably received than the legalese version, fared poorly on questions 1, 4, and 21 relating to word choice, conciseness, and comprehensibility. In retrospect, as noted earlier, we could have made it simpler.<sup>66</sup>

Table I shows even more striking differences between the legalese and plain English versions of the petition for rehearing segment. The legalese version was significantly more likely to be labeled poorly worded, unconvincing, vague, not concise, unpersuasive, uncreative, unscholarly, from a non-prestigious firm or an ineffective appellate advocate, unpowerful, incomprehensible and ambiguous.

As anticipated when the questionnaire was developed, the twenty-two questions were grouped into five underlying variables: I. Content; II. Persuasive Power; III. Writer's Qualifications; IV. Writer's Professional Credentials; and V. Writer's Personal Credibility. Table II displays the content of the question and question numbers which tended to group together statistically because of similarity of subjects' responses.<sup>67</sup>

---

66. See *supra* note 52 and accompanying text.

67. Factor analysis takes the variance defined by inter-correlations among measures and groups the items to create fewer underlying hypothetical variables. For a discussion of factor analysis, see *MULTIVARIATE TECHNIQUES IN HUMAN COMMUNICATION RESEARCH* (P. Monge & J. Cappella ed. 1980); H. HARMON, *MODERN FACTOR ANALYSIS* (1976).



TABLE II  
FACTOR GROUPING (CLUSTERS)

Factor Label	Question Number	Content of Question
I. Content	3	Vague writing
	4	Writing not concise or specific
	6	Uncreative person
	21	Incomprehensible writing
	22	Ambiguous writing
II. Persuasive Power	2	Not a convincing writer
	10	Unpersuasive person
III. Writer's Qualifications	8	Not a competent person
	9	Not well educated person
	11	Unscholarly person
	20	Illogical person
IV. Writer's Professional Credentials	14	Unsuccessful lawyer
	19	Not a powerful person
	12	Not from prestigious firm
	13	Ineffective appellate advocate
V. Writer's Personal Credibility	17	Dishonest person
	18	Unbelievable person

Table III displays the results of a Cronbach's Alpha test. This test evaluates whether question items within a cluster or factor measured the same variable as intended.<sup>68</sup> This table shows that only the credibility scale (V) failed to meet this test. Even this scale met this test if the petition segments are examined separately.

The failure to meet reliability on the credibility scale may be explained by the fact that many of the subjects told the experimenter they were hesitant to assess writer honesty (question 17) or believability (ques-

68. For a discussion of the Cronbach's Alpha test, see SPSS, INC., *SPSS X USER'S GUIDE* 857-965 (1984). A value of .60 is acceptable in testing the reliability of the scale. Table III displays the results of this test.

tion 18) on the basis of reading short passages. The fact that the appellate brief segments were shorter than the petition segments may have intensified this problem.

TABLE III  
RELIABILITY OF FACTORS

Factors	Appellate Brief	Petition for Rehearing	Combined Reliability
I. Content: (Questions 3, 4, 6, 21, 22)	0.74*	0.76*	0.75*
II. Persuasive Power: (Questions 2, 5)	0.89*	0.89*	0.89*
III. Writer's Qualifications: (Questions 8, 9, 11, 20)	0.87*	0.84*	0.86*
IV. Writer's Professional Credentials: (Questions 12, 13, 14, 19)	0.68*	0.74*	0.72*
V. Writer's Professional Credentials: (Questions 17, 18)	0.38	0.63*	0.51

\* Meets the desired level of reliability using the Cronbach's Alpha test.

Regarding the clustering of items under the persuasive power factor (II), question 2 may have been perceived as asking about whether the writer was convincing on this particular occasion. This correlated to question 5 which asked if the subject was persuaded by this passage. While question 10 ("the writer is an unpersuasive person") sounds like it should have fallen within this cluster, it did not meet the statistical test. It is possible that the subjects had trouble reacting to this general

TABLE IV  
 t-TEST RESULTS FOR CONTENT FACTOR AND PERSUASIVE POWER FACTOR BETWEEN  
 LEGALESE AND REVISED SEGMENTS

	Appellate Brief				Petition for Rehearing				Both			
	Means		T-Value	Means		T-Value	Means		T-Value	Means		T-Value
	Legalese	Revision		Legalese	Revision		Legalese	Revision		Legalese	Revision	
Content	4.24	4.09	+0.63	3.87	2.52	+4.79***	4.06	3.30	4.06	3.30	+3.96***	
Persuasive Power	4.65	3.87	+2.90**	4.10	3.10	+4.09***	4.38	3.49	4.38	3.49	+5.98***	

\*\* Significant at less than .01 level  
 \*\*\* Significant at less than .001 level

question about personality type, given the short length of the segments to evaluate.

Table IV reports the t-test results of the subjects' assessment of the content and persuasive power factors. The hypothesized differences between the original and revised segments were generally found to be statistically significant.

A high mean score on content means that the writing was perceived as poor in quality (vague, not concise, uncreative, incomprehensible and ambiguous). There was a statistically significant difference for the petition segments. The legalese segment was perceived as being significantly poorer in content than the revised segment. Although this comparison for the appellate brief segments did not yield statistical significance, grouping all the data together produced a significant difference.

A high score on the persuasive power factor (not convincing, unpersuasive) meant the segment was not persuasive. Across all segments the results were statistically significant. The revised segments were perceived as considerably more persuasive than the originals.

## V. CONCLUSION

It appears that lawyers run substantial risks when writing documents in traditional legalese, even when the intended audience for those documents consists entirely of judges and their aides. Lawyers who write in legalese are likely to have their work judged as unpersuasive and substantively weak. Perhaps even more worrisome for these lawyers personally is the finding that their own professional credentials may be judged less credible. More research in this area will assist law professors in teaching students to write more effectively. More research in this area should also cause practicing attorneys to take note of the importance not only of what they write, but how they write it.

## APPENDIX I

TO: Justices and Research Attorneys  
FROM: Joan Kessler, Ph.D.  
RE: Study of Brief Writing  
DATE: April 8, 1985

Professor Robert Benson of Loyola Law School and I would like to administer a short anonymous questionnaire evaluating appellate brief writing. The project would not take more than fifteen minutes of your time.

I am currently on a leave of absence from my position as an associate professor of communication at California State University, Northridge. I am a second-year student at Loyola Law School and I am an Extern with Division Five this semester. I have done various studies of jury behavior, and I have published in this area. Professor Benson is an expert on legal writing, and has published in this area.

Thank you for your assistance.

## APPENDIX II

DEBRIEFING MEMO

TO: Justices and Research Attorneys  
FROM: Professor Robert W. Benson, Loyola Law School, and  
Joan B. Kessler  
DATE: May 30, 1985  
RE: *Appellate Brief Writing Project*

Thank you for your assistance in our project. We took two segments from actual appellate briefs that appeared to be written in traditional legalese. We then rewrote the segments into plain English. You and 42 other Justices or Research Attorneys at the Court of Appeal were shown either the original or the revised segments, and were asked to react to statements about them. The results strongly indicated that the revised segments were perceived by you as more persuasive and more credible than the originals.

While there is considerable anecdotal evidence that courts are more persuaded by clear, simple English than by traditional legalese, many lawyers fear that it is risky to believe the anecdotes. The study you participated in provides the first solid, empirical evidence that, in appellate briefs, plain English is in fact more effective than traditional legalese. We hope to drive this point home to the practicing bar, to law school faculties, and to students.

We are in the process of submitting the article for publication and will advise you of our progress. In the meantime, if you would like a statistical analysis of the findings of our study, please contact Professor Benson at Loyola.

Thanks again for your generous cooperation.

