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Pleasing the Court

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Comes now, Lawyer X, and files this his wordy pleading full of acronyms and legalese, and in support thereof insists that the Court will think he doesn't know what he is doing if he writes it any other way.

Is he right?

Lawyers frequently persist in using old forms, with wordy constructions and outdated language, because of a fear that any deviation from conventions will cause the court to distrust the document. Is that the likely reaction from the bench? Surveys, articles written by judges, and the occasional opinion begging for reform suggest the answer is no. Judge Lynn Hughes of the United States District Court of the Southern District of Texas has addressed the issue directly:

When I speak of simplified, clear forms, I inevitably get the reaction that somebody out there requires bad writing. That is not true. The abundant examples of bad writing are no more proof that it is somehow necessary than the plentiful examples of bad architecture are proof of the inherent unattractiveness of physics.¹

So what does please the court? The easiest test might be the Golden Rule. If you wouldn't want to read it, don't write it. As Judge A. Benjamin Goldgar of the United States Bankruptcy Court for the Northern District of Illinois has said, "The key to all effective expository writing, legal and otherwise, is to keep your audience in mind—to put yourself in the reader's place and see what matters from the reader's point of view."² Here are ten specific guidelines, compiled from the writing of judges—your readers.

Use plainer English.

Many judges have pleaded with lawyers to use plainer English. For example, consider this from Judge Goldgar:

Be plain. Write in plain English. Too many lawyers seem to take a perverse pride in being as stuffy and dense as possible. Their prose has about as much snap as tapioca. Interminable sentences composed of immense words fill endless paragraphs. Keep your sentences and paragraphs short and your language simple and direct. And be as conversational as you can without becoming informal or colloquial. A little pizzazz, the occasional nice turn of phrase, is not only permitted but welcome. Legal writing can sparkle, too.³

¹ Lynn N. Hughes, *You Want Me to Read What?* (on file with author).

² Judge A. Benjamin Goldgar, *Writing to Convince a Judge: Some Tips from Your Audience*, CBA Record 51 (May 2006).

³ Goldgar, *supra*, at 52.

Despite the pleas from various judges for plain English, many lawyers persist in using stuffy, outdated prose, for fear of displeasing a judge. To gather empirical data, rather than anecdotes, about what judges really prefer, Sean Flammer conducted a survey of judges around the country.⁴ He used three different writing samples to test the judges' reactions to plain English and informal versions of a traditional legal motion.⁵

As Flammer noted at the outset, "plain English" is hard to define, but centers on the idea that documents should be designed and written to best serve the reader, conveying ideas with the greatest possible clarity.⁶ Techniques used to increase readability include headings, topic sentences, short sentences, active voice, lists and bullet points, familiar words, and the omission of unnecessary facts or details.⁷ Flammer revised a traditional motion into two versions.⁸ The "plain English" version revised the traditional motion by employing readability techniques.⁹ The "informal" version went further, using contractions, first person, and a conversational tone.¹⁰

Because he was worried about the response rate, Flammer sent only two of the writing samples—either the traditional version and the plain English version or the traditional version and the informal version—to each surveyed judge.¹¹ He sent the surveys to 800 judges, with half receiving each combination.¹² The surveys were divided equally among four cohorts: state trial judges, state appellate judges, federal trial judges, and federal appellate judges.¹³

The survey responses showed that judges who find plain English more persuasive are in the majority. Flammer received 292 completed surveys.¹⁴ Among the respondents who received the traditional and plain English versions, judges found the plain English version more persuasive, 66 percent to 34 percent.¹⁵ Each cohort of judges preferred the plain English version.¹⁶ Among the respondents who received the traditional and informal version, judges found the informal version more persuasive, 58 percent to 42 percent.¹⁷ Some judges commented about the reasons for their choices. One called the plain English version

⁴ Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 *Legal Writing: J. Legal Writing Inst.* 183 (20120)

⁵ *Id.* at 191.

⁶ *Id.* at 186; see also Wayne Schiess, *Briefs and Contracts in Plain English? Part 1: What is Plain English?* *Austin Lawyer* 12 (Feb. 2011) (defining plain English as "a form of legal writing that can be read and understood by nonlawyers.").

⁷ *Id.* at 186 (citing Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 *Thomas M. Cooley L. Rev.* 1, 44-45 (1992)).

⁸ *Id.* at 191.

⁹ *Id.* at 193-94.

¹⁰ *Id.* at 195-96.

¹¹ *Id.* at 197.

¹² *Id.*

¹³ *Id.* at 190-91.

¹⁴ *Id.* at 198.

¹⁵ *Id.* at 199.

¹⁶ *Id.*

¹⁷ *Id.* at 205.

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