

**AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
SECTION OF STATE AND LOCAL GOVERNMENT LAW
SECTION OF ENVIRONMENT, ENERGY AND RESOURCES
COALITION FOR JUSTICE**

RECOMMENDATION

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3 RESOLVED, That the American Bar Association urges agencies to use plain language in writing
4 regulations, as a means of promoting the understanding of legal obligations, using such
5 techniques as:

- 6 • Organizing them for the convenience of their readers;
- 7 • Using direct and easily understood language;
- 8 • Writing in short sentences, in the active voice; and
- 9 • Using helpful stylistic devices, such as question-and-answer formats, vertical lists,
10 spacing that facilitates clarity, and tables.

11 To avoid problems in the use of plain language techniques, agencies should:

- 12 • Take into account possible judicial interpretations as well as user understanding;
- 13 • Clearly state the obligations and rights of persons affected, as well as those of the
14 agency; and
- 15 • Identify and explain all intended changes when revising regulations.

**AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE**

REPORT

On June 1, the President issued an Executive Memorandum directing that Federal agencies use plain language in their documents.¹ The President undertook this initiative in an effort to make the Federal government more responsive, accessible, and understandable in its communications with the public. The President's memorandum argued that plain language sends a clear message about what the Government is doing, what it requires, and what services it offers. Moreover, the President asserted that plain language saves the Government and the private sector time, effort, and money.² Clear communication tends to increase government transparency and accountability.³

Requirements

The President's memorandum directed that:

1. By October 1, 1998, Federal agencies "use plain language in all new documents, other than regulations, that explain how to obtain a benefit or service or how to comply with a requirement [they] administer or enforce. For example, these documents may include letters, forms, notices, and instructions. By January 1, 2002, all such documents created prior to October 1, 1998, must also be in plain language."
2. By January 1, 1999, Federal agencies "use plain language in all proposed and final rulemakings published in the *Federal Register*, unless [they] proposed the rule before that date. [The agencies] should consider rewriting existing regulations in plain language when [they] have the opportunity and resources to do so."⁴

Though not ordered to do so, the independent agencies were asked to comply with these directives.⁵ To judge by the designation of agency representatives to the plain language enterprise, many have complied with this request. (Established ABA positions would support a presi-

¹ Memorandum to the Heads of All Departments and Agencies, Presidential Memorandum on Plain Language, June 1, 1998, 63 FR 31885 (June 10, 1998).

² Id. at 31885.

³ *Maria Walters et al. v. Reno*, 1998 U.S. App. LEXIS 9846 (9th Cir. May 18, 1998).

⁴ Id. at 31885.

⁵ Id. at 31885.

dential directive to the independent commissions on this as on other coordinative efforts.) The SEC, notably, has generated “A Plain English Handbook” on the creation of clear disclosure documents, and adopted rules requiring that every prospectus have its cover page, summary, and risk factors in plain English.

The President’s memorandum states that plain language requirements vary from one document to another, depending on the intended audience. However, the Memorandum sets out certain features the President believes are generally useful in a plain language document. Specifically, according to the President’s memorandum, “plain language documents should have logical organization and easy-to-read design features, and should use common, everyday words, except for necessary technical terms; ‘you’ and personal pronouns; active voice; and short sentences.”⁶

Vice President’s Guidance

The President’s memorandum assigned to the National Partnership for Reinventing Government (NPR) the task of issuing guidance to help agencies comply with the directive and to explain more fully the elements of plain language.⁷ On July 31, Vice President Gore issued this guidance.⁸ It required each agency head, by mid-August, to designate a senior official responsible for implementing the President’s memorandum.⁹ This official represents the agency on NPR’s Plain Language Action Network (PLAN), an interagency committee charged with making plain language standards for all government communications. Further, the Vice President directed each agency to design its own plain language action plan by September 4, 1998.¹⁰ These action plans were to set out strategies for: communicating the President’s expectations to employees, equipping staff with needed tools, meeting the deadlines established in the President’s Memorandum, and sustaining change over the long term.

While the President’s memorandum directs agencies to use plain language in proposed and final rules, the Vice President’s guidance expands the domain of plain language to notices of data availability, technical amendments, Advance Notices of Proposed Rulemaking, and other notices related to rulemaking. The Vice President’s guidance also directs agencies to improve the clarity of regulatory support documents like background information documents, economic assessments, risk assessments, and other technical support documents.¹¹ In support, NPR has

⁶ Id. at 31885.

⁷ Id. at 31885.

⁸ *How to Comply with the President’s Memo on Plain Language*, National Partnership for Reinventing Government, Plain Language Action Network website, <http://www.plainlanguage.gov> (July 31, 1998).

⁹ Id. at 1.

¹⁰ Id. at 1.

¹¹ Id. at 4.

established a central web site, <http://plainlanguage.gov>, where users can find a handbook, “Writing User-Friendly Documents,” examples, links to responsible officials and to members of PLAN’s steering committee, and other helpful matter.

Elements of Plain Language

Although plain language cannot be reduced to a particular format or formula, the literature yields general agreement on certain core principles.¹²

Authors should organize documents for the convenience of their readers, not themselves. This means providing information in the order readers will find most useful. Although it is often helpful to put definitions at the front of the document, they can also be distracting. Thus, it may make sense to state eligibility criteria for a program first, and to define terms as they are used. Ultimately, the topic covered and the audience sought to be addressed control what is the most appropriate order for a document.

Second, authors should use clear and easy to understand language. Familiar vocabulary makes regulation understandable. “You” and other pronouns will often clarify, in a familiar and direct way, who is being asked to comply, and who is the source of that direction. In general, use of the active voice makes it easier for the public to understand the document and avoids ambiguity. Shorter sentences present one idea or concept at a time. This practice allows the reader to digest distinct bits of information in sequence. Also, it means the reader does not need continually to refer back to previous clauses to determine exceptions or applicability. An arbitrary limit on the number of words in a sentence would be inappropriate. Nonetheless, authors often can break sentences with many words or clauses into several shorter sentences.

Finally, authors should use helpful stylistic devices, such as question-and-answer formats, vertical lists, spacing that facilitates clarity, and tables. A question-and-answer format, particularly in headings, can help organize materials around a reader’s interests. Judicious use of spacing and indentations, as in a recent rulemaking proposed by the Department of Transportation, can be very helpful in easing a reader’s way into the dense format of the Federal Register.¹³ Graphic depictions present material in a more accessible and understandable format, particularly in regulations. In many instances, placing complicated provisions into tables or lists dramatically improves their readability, and may greatly reduce the number of words needed. Finally, presenting material in graph form eliminates the need to repeat introductory and clarifying language.

¹² See generally: William Strunk, Jr., *Elements of Style*, Privately Printed, Ithaca, New York (1918); Joseph Kimble, *Answering the Critics of Plain Language*, 5 *Scribes J. Legal Writing* 51 (1994-1995); David Mellinkott, *Legal Writing: Sense and Nonsense*, West (1982); Richard C. Wydick, *Plain English for Lawyers* (Third Edition), Carolina Academic Press (1994); Robert J. Martineau, *Drafting Legislation and Rules in Plain English*, West (1991); Securities and Exchange Commission, *A Plain English Handbook; How to Create Clear SEC Disclosure Documents*, Securities and Exchange Commission, Washington, D.C., August 20, 1998; Office of the Federal Register, National Archives and Record Administration, *Making Regulations Readable*, Office of the Federal Register Document Drafting Handbook, <http://www.nara.gov/fedreg/ddhome.html> (April, 1997).

¹³ Fed. Reg. 68624-33, Dec. 11, 1998.

Two examples illustrate these concepts. The first example comes from the National Park Service. The Park Service revised rules that control off-road vehicle use at Cape Cod National Seashore. The previous rule stated:

When the process of freeing a vehicle that has been stuck results in ruts or holes, the operator will fill the ruts or holes created by such activity before removing the vehicle from the immediate area.¹⁴

The revised rule states:

If you make a rut or hole while freeing a stuck vehicle, you must fill the rut or hole before you move the vehicle from the area.¹⁵

A second example comes from the Department of Commerce. Recently, the Department of Commerce's Bureau of Export Administration (BXA) re-drafted the entire Export Administration Regulation (EAR).¹⁶ BXA used logical organization and incorporated charts to help explain the application of this complex body of regulations. In so doing, the agency completely re-structured the regulation. The first part of the revised EAR included in the Code of Federal Regulations is now called "Steps."¹⁷ This part explains to an exporter how to apply the remainder of the regulatory regime. It also includes "decision-tree" diagrams to explain how to apply the regulations.¹⁸ Further, all the export prohibitions previously scattered throughout the EAR were combined in one part.¹⁹ Finally, a "Country Chart" demonstrates in a graph when an export license is required.²⁰

To achieve the goals of transparency and accountability, agencies will need to measure their success in drafting plain language documents. The best way to make this measurement is to ask those who use the documents. Agencies and bureaus should consider including standard language in all proposed rule preambles, soliciting public comment on any ambiguities or drafting errors present in the document.

Cautions about Plain Language

¹⁴ 36 CFR 7.67(a)(2)(v).

¹⁵ 36 CFR 7.67(a)(4)(vi) (Revised Feb. 24, 1998, 63 FR 9143, 9147).

¹⁶ 15 CFR 730 et seq.

¹⁷ 15 CFR 732.

¹⁸ Id. at Supp. 1.

¹⁹ 15 CFR 736.

²⁰ 15 CFR 738, Supp. 1.

In making the effort to draft regulations in plain language, as they should, agencies should observe a number of cautions:

First, if judicial review of the regulation is possible, agencies need to be aware of possible effects of prevailing styles of judicial interpretation on plain language regulations. Inherent in the plain language idea is that a text should address, in the most straightforward possible way, the core issues to which it applies. Exceptional cases and details are peripheral concerns, which tend to confuse the honest citizen who wants to know what her major obligations are. Yet courts employing some styles of interpretation, most notably “plain meaning” approaches, may not accept the proposition that regulation drafters can limit their attention to the core obligations of those subject to a regulation. If, consequently, authors do not clearly address a secondary issue, the court may conclude that it is not an element of the regulation. Since regulated interests may often have incentives to test the limits of rules, regulators must heed the ways in which their language might be used or limited in its application. It might be possible, for example, to have additional sections or subsections dealing with foreseeable fringe issues, after the text explains core obligations in direct language.

The Securities and Exchange Commission (SEC) addresses the need for completeness in its handbook on producing disclosure documents in plain English.²¹ In its frontispiece it both encourages the use of “well-established techniques for writing in plain English to create clearer and more informative disclosure documents,” and reminds the user that “Of course, when drafting a document for filing with the SEC, you must make sure that it meets all legal requirements.” In response to the question “What is a ‘Plain English’ Document?” the SEC handbook states the following:

We’ll start by dispelling a common misconception about plain English writing. It does not mean deleting complex information to make the document easier to understand. For investors to make informed decisions, disclosure documents must impart complex information. Using plain English assures the orderly and clear presentation of complex information so that investors have the best possible chance of understanding it.

Second, agencies should not make the language of regulations plain by the expedient of referring to bureaucratic discretion issues that more complex language could deal with. Doing so would leave an agency with no standards to cabin its discretion. This approach would disserve not only members of the regulated community, but also agency personnel charged with implementing the regulatory regime, who may look to the regulations for guidance.

This risk is not trivial and can evade the best of intentions. Consider, for example, the rewritten regulation chosen for the Vice President’s second “No Gobbledygook Award,” a revision of BLM regulations on leasing and developing federal land to produce geothermal power.²²

²¹ Securities and Exchange Commission, *A Plain English Handbook; How to Create Clear SEC Disclosure Documents*, Securities and Exchange Commission, Washington, D.C., August 20, 1998.

²² Office of the Vice President, “Vice President Gore Presents Second Plain Language Award,” Press release of August 5,

In three complicated paragraphs, the original regulation described application procedures and set forth some necessary content of the application. It also referenced other sections of the regulation which included standards for the application document. The award-winning rewrite reads as follows:

“If you want to use federal land to produce geothermal power, you have to get a site license and construction permit before you even start preparing the site. Send a plan to the BLM that shows what you want to do and write up a proposed site license agreement that you think is fair and reasonable. The BLM will review it and decide whether or not to give you a permit and license to proceed with work on the site. Until and unless they do, don’t even think about it.”

Notice that this regulation does not say what standards will govern BLM’s decision, or where such standards could be found. The applicant is to propose what it thinks “fair and reasonable.” The BLM will then decide whether that test has been met. Work that a regulation might have done appears instead to have been left to bureaucratic discretion.

A regulation should clearly state the obligations and rights of those it affects, as well as the rights and obligations of the agency. This regulation succeeds in this goal in one respect. No readers could fail to appreciate that they should not start any action on a geothermal site on federal land before acquiring a permit. But it fails in other respects. Applicants are given no information what the agency expects or whether what they think “fair and reasonable” will satisfy the agency. Other interested members of the public will not be able to learn on what principles the agency conducts its business. And no public standard guides the agency in the exercise of its discretion to grant or deny the application.

Perhaps it could be answered, in defense of this regulation, that the geothermal industry is a small one, confined to limited geographic areas; BLM has been working with its members for years. While regulations which apply universally should contain standards that any casual reader could understand and comply with, this argument would run, here the actors know each other well, in the institutional sense if not the more personal. Other policy ends of government, such as enhancing regulatory flexibility, may argue in such circumstances for permitting the agency to act on trust, rather than by the rule – at least until the existing working relationships break down. Of course this approach reduces, pro tanto, the possibility of monitoring by others, say by environmental groups; it can conduce to cozy as well as to arbitrary relationships. Transparency is improved not only by plain language, but also by openness about standards being employed.

Several of the Vice President's other plain language awards²³ suggest the final cautionary principle stated above, that revisions should not alter existing regulations without noting and explaining the changes. The first, third, and fourth of his awards, as they appear on the plain language website, all substitute quite brief directives for a former regulation – appearing, in the rewriting, to have omitted former regulatory coverage. Thus, a rule that initially applied to “all operations involving the immersion of materials in *liquids, or in the vapors of such liquids*, for the purpose of cleaning or altering the surface or adding to or imparting a finish thereto or changing the character of the materials, and their subsequent removal from the liquid or vapor, draining, and drying” becomes a rule that applies only to the use of liquids other than water in “dip tanks.” A rule about the booking and reimbursement of government employee travel that serves both government and personal purposes loses all detail about booking. A rule on housing discrimination complaints, similarly, no longer addresses the content of a complaint or the possibility of filing it with state officials.

In each of these cases it is possible that other provisions, not reflected in the “award” materials, now address what seems to have been changed. But it is also possible that the push to conciseness has led to a decision to change the content of the regulation – and the demonstrative materials on the awards appear to be unconcerned with that outcome. The regulations are presented as if the initial and revised versions of the regulation were legal equivalents.

Notice that these reformulations can be used to illustrate the need for caution suggested above, when there is a prospect of judicial review. Some people might think the preceding paragraph uncharitable – resistant to the plain language idea in its understanding of what the revisions accomplished. But in our judgment, judges applying a “plain meaning” interpretation of the revised regulations would most naturally find that they have substantially changed. OSHA's regulation now applies only to “dip tanks” and to liquids, and it does not apply to water -- whatever its temperature. Even if these changes were unintended, the broader application of the earlier regulation would not interest a court committed to reading legislative texts with attention to what they actually say. It is doubtful that even *Chevron* could rescue the agency here; the agency's discretion is limited by what the language of the instrument it is interpreting appears to permit, using traditional tools of interpretation.

One proposition in response might be this: where an agency rewrites a rule without intending to change its application or meaning, the text of the rule should so state. In such a case, the original text would remain applicable; for purposes of judicial review, the two would be treated as having the same meaning. This, however, would be a highly imperfect response, particularly for proponents of plain language. It would tell citizens and courts that they have not one but two sources to consult to determine their legal obligations – and that in the case of seeming conflict, the less well written source is to prevail. Any such course would be self-defeating. The better course is to remain aware, in pursuing the worthy goals of plain language drafting, that it poses risks against which it is important to guard. Achieving a noteworthy

²³ Office of the Vice President, “Vice President Gore Presents First Award for Federal Writing in Plain Language,” June 30, 1998 (

improvement in legal administration requires some caution as well as commitment in implementing the President's plain language directive.

Conclusion

When the Federal government articulates clearly what it requires and what benefits it offers, it is most likely to achieve the goals of accountability and transparency. These are goals the Federal government should seek to achieve. The American Bar Association encourages the use of plain language in regulations. Plain language is a means of effective communication to promote understanding of legal obligations. However, the Federal government, in drafting plain language documents, should avoid unintended consequences that could frustrate its laudable goals.

Respectfully submitted,

Ronald A. Cass
Chair

August 1999

GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Ronald A. Cass, Chair of the Section of Administrative Law and

Regulatory Practice

1. Summary of Recommendation.

The recommendation urges agencies to use plain language in writing regulations, as a means of promoting the understanding of legal obligations.

2. Approval by Submitting Entity.

This report with recommendation was approved by the Council of the Section of Administrative Law and Regulatory Practice at its February 6-7, 1999 meeting for consideration by the ABA House of Delegates in August 1999.

3. Has this or a similar recommendation been submitted to the House of Delegates or Board of Governors previously?

No.

4. What existing policies are relevant to this recommendation and how would they be affected by its adoption?

There are no relevant Association policies pertaining to the use of plain language in writing regulations.

5. What urgency exists which requires action at this meeting of the House?

The President has issued an Executive Memorandum directing that Federal agencies use plain language in their documents, and urging that independent agencies do so as well. This resolution would allow the ABA to support full compliance with this directive by all agencies, and will offer guidance to agencies on how to implement plain language in an effective and responsible manner.

6. Status of Legislation (if applicable).

No legislation is pending.

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of this recommendation would not result in direct or indirect costs to the Association.

8. Disclosure of Interest. (If applicable.)

There is no conflict known to exist.

9. Referrals.

Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the House of Delegates agenda, it is being circulated to all ABA Sections and Committees.

10. Contact Person. (Prior to meeting.)

Ronald A. Cass
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215-1401
(617) 353-3112
(617) 353-7400

11. Contact Persons. (Who will present the report to the House.)

Ronald A. Cass	Theodore B. Olson
Boston University School of Law	Gibson, Dunn & Crutcher
765 Commonwealth Avenue	1050 Connecticut Avenue, N.W., Suite 900
Boston, MA 02215-1401	Washington, DC 20036
(617) 353-3112	(202) 955-8668
(617) 353-7400	(202) 467-0539

12. Contact Person Regarding Amendments to this Recommendation.

No proposed amendments are known to exist. The person to contact concerning proposed amendments is Ronald A. Cass.

EXECUTIVE SUMMARY

1. Summary of the recommendation.

The recommendation would urge agencies to use plain language in writing regulations.

2. Summary of the issue which the recommendation addresses.

Plain language is a means of effective communication to promote understanding of legal obligations. On June 1, 1998, the President issued an Executive Memorandum directing that Federal agencies use plain language in their documents. The President undertook this initiative in an effort to make the Federal government more responsive, accessible, and understandable in its communications with the public. This recommendation cautions agencies to take into account possible judicial interpretations, clearly state the obligations and rights of persons affected, as well as those of the agency, and identify and explain all intended changes when revising regulations.

3. Please explain how the proposed policy position will address this issue.

The recommendation will articulate Association support for the use of plain language in writing regulations while noting that agencies should observe a number of cautions in the process.

4. Summary of any minority views or opposition which have been identified.

No opposition is known to exist.