Plain Language in the Written Law

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Introduction

As a law student, I was once asked to draft a Memorandum of Understanding (MOU) with a confidentiality clause. I was tasked with clearly indicating what information would fall under the definition of "confidential" so that each party would know exactly what they were prohibited from sharing. My professor pointed me towards a sample MOU from a Practical Law guide, which used the following language:

> During the term of this MOU, either Party (as the "Disclosing Party") may disclose or make available to the other Party (as the "Receiving Party") information about its business affairs, products/services, confidential intellectual property, trade secrets, third-party confidential information and other sensitive or proprietary information, whether orally or in written, electronic or other form or media, and whether or not marked, designated or otherwise identified as "confidential" (collectively, "Confidential Information").[1]

This sentence took several minutes for me to understand. The main clause simply stated that "either party . . . may disclose . . . to the other party . . . confidential information." It was unclear whether "may" was used in a permissive sense (either party is *allowed* to disclose confidential information to the other party) or as an indicator of possibility (it is *possible* that either party might at some point disclose information to the other party). More importantly, the main clause did not even contain the most important part of this sentence: the definition of "confidential information." Instead of being clearly explained in a separate sentence, that crucial definition was hidden in the center of a convoluted sentence that, at first glance, seemed to be merely a statement about what "may" occur.

As a law student, I took for granted that this language was properly suited for its purpose. Although I sensed that it would be difficult for many people to understand, it contained a lot of detail and had a certain formality that I believed necessary for a legal document. Thankfully, my professor identified this sentence as needlessly formal and technical language (commonly known as "legalese"), and we scrapped it.

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1. *Memorandum of Understanding: Commercial Transactions*, Thomson Reuters Practical Law, https://us.practicallaw.thomsonreuters.com/w-003-1279 (last visited Dec. 20, 2022) [https://perma.cc/G8GJ-FYX6].

Many academics and practitioners have long called for lawyers to avoid legalese.[2] In fact, Robert W. Benson, a professor at Loyola Law School, was so buoyed by these efforts that he predicted the impending "end of legalese" in 1984.[3] By then, several empirical studies had shown that nonlawyer comprehension of legal materials significantly improved when those legal materials were translated into plain English.[4] Benson concluded that lawyers clung to legalese solely out of self-interest, e.g., to avoid the effort of changing from a traditional writing style and to preserve status and power within the legal profession.[5] However, Benson ended his analysis on a rosy note, claiming that a recent "flood of plain language statutes" would hasten the end of legalese.[6] Some of these statutes allowed people to sue under a right to a plain English document.[7] Benson reasoned that by creating such a right, these statutes also implicitly threatened malpractice liability on lawyers who failed to make such claims on behalf of their clients.[8] Because these statutes increased the risks and costs of using legalese, Benson believed that lawyers would eventually reduce their use of legalese out of self-interest.[9]

Fast-forward almost forty years and it seems we still have a legalese problem. Benson was overly optimistic.[10] Even though recent years have seen the flood of plain language legislation grow across the country,[11] this legislation has apparently not scared the average American lawyer into writing more plainly.[12] Without further intervention, future generations of lawyers are unlikely to write any more plainly. Law students today are still exposed to plenty of legalese, as evidenced by the Practical Law excerpt above, and they rarely practice writing for non-legal audiences.[13]

The legalese problem extends to the language of the law itself, which has stubbornly resisted change over the last fifty years in spite of the plain language

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2. Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 520–22 (1984).

3. *Id.*

4. *Id.* at 536–57.

5. *Id.* at 569–71.

6. *Id.* at 573.

7. *Id.* at 572.

8. *Id.* at 573.

9. *Id.*

10. Perhaps Benson overestimated the threat of litigation for lawyers who failed to incorporate plain language into their writing. For example, a New York plain language statute discouraged such litigation by limiting claims to contracts worth less than $50,000 and providing a good faith defense. Michael S. Friman, *Plain English Statutes - Long Overdue or Underdone*, 7 LOY. CONSUMER L. REP. 103, 106 (1995).

11. *See* Michael A. Blasie, *The Rise of Plain Language Laws*, 76 U. MIAMI L. REV. 447 (2022).

12. A recent survey of 120 American consumer contracts found that fewer than half of them incorporated plain language principles. Anna Sobota, *The Plain Language Movement and Modern Legal Drafting*, 20 COMPARATIVE LEGILINGUISTICS 19, 23 (2014).

13. *See infra-Part III*.A.

movement.[14] When statutes and rules are written in legalese, nonlawyers are likely to misunderstand the meaning of the law. As the renowned Judge Guido Calabresi pointed out in 1982, our legal system has shifted in the modern era from one based primarily in common law to one based primarily in statutes and administrative rules.[15] Therefore, incomprehensible written law has wide-ranging repercussions for the public, who might fail to understand the law and its consequences. Despite this, plain language advocates have given little attention to statutory drafting.[16]

This Note argues that lawyers should be using plain language when drafting the law itself, from agency rules to statutes, and that the best way to overcome the inertia keeping lawyers stuck in the world of legalese is to create a professional responsibility to draft the law in plain language with a rule in the *ABA Model Rules of Professional Conduct*. Part I provides an overview of the plain language movement and arguments in favor of plain language in the legal field generally. Part II explores the negative impact of legalese in the written law, and Part III argues that a Model Rule would be the most effective way to cultivate the use of plain language in the written law throughout the profession.

I. PLAIN LANGUAGE MOVEMENT

A. HISTORY OF THE PLAIN LANGUAGE MOVEMENT

Frustration with legal language has existed for centuries, with even the Founding Fathers registering complaints about the quality of legal writing.[17] But the modern plain language movement took off in 1963 with the publication of *The Language of the Law* by David Mellinkoff.[18] Mellinkoff was the first academic to describe the specific characteristics of legal language in terms of distinctive vocabulary, syntax, organization, and style.[19] These distinctive features range from Latin phrases to overly complex sentences to a "pompous tone" and more.[20]

Mellinkoff believed that lawyers should eschew these distinctive features and instead write in a way that could be easily understood by their intended audience, arguing that "the language of the law should not be different [from everyday

14. For example, an analysis of all federal laws in the U.S. between 1951–2009 showed no meaningful increase in the use of plain language over time. *See* Eric Martinez, Francis Mollica & Edward Gibson, *So much for plain language: An analysis of the accessibility of United States federal laws (1951–2009)*, 44 PROC. ANN. MEETING COGNITIVE SCI. SOC'Y 297, 301 (2022).

15. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1–7 (1982).

16. ROBERT J. MARTINEAU & MICHAEL B. SALERNO, LEGAL, LEGISLATIVE, AND RULE DRAFTING IN PLAIN ENGLISH 3–4 (2005).

17. Blasie, *supra* note 11, at 455.

18. *Id*. at 465.

19. Benson, *supra* note 2, at 523.

20. *Id*. at 523–26.

language] without a reason."[21] This is the underlying principle of the plain language movement: legal language should mirror the everyday language of its audience so that the "audience can understand the first time they read or hear it."[22] This does not mean that plain language should be dumbed-down or "drab or dreary," but instead that it should be interesting, clear, and straightforward.[23] This also does not mean that plain language should use the same style across all documents; instead, each document should be adapted to its own audience.[24]

Throughout the 1970s, the plain language movement gained traction in both state and federal governments, as exemplified by President Carter's executive order requiring "significant" regulations to be as "simple and as clear as possible."[25] Since then, different states have continued to implement plain language laws, with a recent survey by the legal scholar Michael A. Blasie finding 776 plain language laws across the country.[26] These laws are hugely variable in application, with most applying to writing in the private sector and some to writing in the public sector.[27] The vast majority, almost 80%, of these laws apply what Professor Blasie calls a "Descriptive Standard," using abstract phrases like "plain English" and "understandable by a person of average intelligence" to describe a writing standard without guidance on the process or tools used to achieve that standard.[28] Most plain language laws (509, or 58.3% of them) are consumer protection laws and therefore apply to the private sector, while only 33 laws across the country apply to lawmaking in either the executive or legislative branch.[29] Only six states and the District of Columbia impose plain language requirements on legislatures, either in the language of statutes themselves or in other legislative documents.[30] This shows that, while governments and policy makers across the country value the increased comprehensibility of plain language, they have yet to widely apply those higher standards to the lawmaking process itself.

Meanwhile, several agencies in the federal government, including the Securities and Exchange Commission and the Veterans Benefits Administration,

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21. Blasie, *supra* note 11, at 465.

22. *What is plain language?*, PLAIN LANGUAGE ACTION AND INFO. NETWORK, https://www.plainlanguage.gov/about/definitions/ (last visited Dec. 20, 2022) [https://perma.cc/M89S-BJKD].

23. *Bryan Garner on Plain English*, PLAIN LANGUAGE ACTION AND INFORMATION NETWORK, https://www.plainlanguage.gov/about/definitions/bryan-garner-on-plain-english/ (last visited Dec. 20, 2022) [https://perma.cc/AVV2-UWRT].

24. The Center for Plain Language lists "[i]dentify and describe the target audience" as the first step to writing plain language, highlighting the importance of customizing writing style to the audience. *See Five Steps to Plain Language*, CENTER FOR PLAIN LANGUAGE, https://centerforplainlanguage.org/learning-training/five-steps-plain-language/ (last visited Dec. 20, 2022) [https://perma.cc/QJ5E-FZKP].

25. Blasie, *supra* note 11, at 465.

26. *Id*. at 485–86.

27. *Id*.

28. *Id*. at 481–82, 488.

29. *Id*. at 486.

30. *Id*. at 520.

started implementing internal plain language policies in the 1990s.[31] However, some federal employees were frustrated with the pace of plain language reform in the federal government and founded the Center for Plain Language (CPL).[32] The CPL advocated for legislative reform, resulting in the passage of the Plain Writing Act of 2010, which required all federal agencies to use plain writing in public-facing communications starting in 2011.[33]

According to the CPL report cards, federal agencies overall have improved the quality of their writing since the Plain Writing Act was passed. In addition to the plain writing requirement, the Plain Writing Act also imposed procedural requirements on federal agencies to encourage compliance, such as reporting and the appointment of a designated official to oversee implementation of the Act.[34] As of 2021, the CPL reported that most agencies have embraced the compliance measures, but that overall writing quality still has room to improve, with only two out of twenty-one agencies receiving an "A" grade.[35] Although some have argued that the lack of enforcement mechanisms in the Plain Writing Act has lessened its impact,[36] the report cards from the CPL show a marked improvement in agency performance over the last ten years.[37]

The success of the Plain Writing Act demonstrates that plain writing rules can and do have a measurable impact on writing quality. However, the Plain Writing Act does not require plain writing in regulations themselves, and instead focuses on the public-facing communications that agencies publish to explain the law.[38] There remains a dearth of plain writing rules for the written law itself.

B. BENEFITS OF PLAIN LANGUAGE

The use of plain language in legal documents is both cost-effective and effective at communicating to readers, as demonstrated by Professor Joseph Kimble in a review of studies on the effect of plain language.[39] Plain language is often more cost effective than legalese because fewer people need to consult with lawyers or government officials in order to understand and comply with legal documents.[40] For example, when the FCC rewrote regulations for CB radios from legalese to plain English, it eliminated the need for full-time staff to field questions about the

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31. Rachel Stabler, *What We've Got Here Is Failure to Communicate: The Plain Writing Act of 2010*, 40 J. LEGIS. 280, 284–85 (2013).

32. *Id.*

33. Plain Writing Act of 2010 §§ 3(2), 4(b), 5 U.S.C.A. § 301 note.

34. Stabler, *supra* note 31, at 290–91.

35. *Report Card Grades Across 10 Years,* CENTER FOR PLAIN LANGUAGE, https://centerforplainlanguage.org/2021-federal-plain-language-report-card/report-card-grades-across-10-years/ (last visited Dec. 20, 2022) [https://perma.cc/7ZRM-ZZVN].

36. Stabler, *supra* note 31, at 319.

37. *Report Card Grades Across 10 Years*, *supra* note 35.

38. *See* Plain Writing Act of 2010 § 3(2).

39. *See* Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEG. WRITING 1 (1996-1997).

40. Blasie, *supra* note 11, at 521.

regulations.[41] Before the rewrite, five people were on call duty; after the rewrite, no one was.[42] In other cases, the use of plain language saved companies and governments significant amounts of money because they reduced errors and therefore reduced the cost of rectifying the errors.[43] Kimble also described numerous studies where participants were asked to read a legal documentbefore and after it was revised to eliminate legalese.[44] In all the studies he identified, readers expressed a preference for the revised version or scored better on comprehension.[45]

More recently, some empirical studies have narrowed down on discrete elements of plain language that have a measurable effect on comprehension. For example, Eric Martínez *et al*. examined five different characteristics of legalese: non-standard capitalization, uncommon words, preference of less-common synonyms, center-embedded clauses, and the passive voice.[46] First they conducted a corpus analysis of legal documents and standard English texts to confirm that these five characteristics were indeed more common in legal language than in standard documents.[47] They then drafted legal texts with and without these five features and measured reader comprehension of the variations.[48] They discovered that, overall, legalese had a negative impact on reader comprehension and that, more specifically, the use of center-embedded clauses was particularly detrimental to reader comprehension.[49] This cognitive science finding confirms what was maybe already obvious: center-embedded clauses are confusing because they interrupt an independent sentence, add a new idea, and then return to the original sentence to continue where it left off.

Beyond sentence structure and word choice, the organization and formatting of a document affect comprehension as well. This is a theme that comes up repeatedly in the writings of plain language advocates—in 1984, Professor Benson highlighted "punctuation, capitalization, sectioning, headings, indentation, typeface, type size, and other graphic devices [that] are frequently used in bizarre ways that do not tie into the meaning or importance of what is being said" as one of the defining features of legalese.[50] Today, the Center for Plain Language advocates for using "information design to help readers see and understand," including by considering spacing and typography.[51] In their report card for agency writing, they specifically commended "large, visible section headings" and "clean graphics

41. Kimble, *supra* note 39, at 7–8.
42. *Id.*
43. *See id.* at 16.
44. *See id.* at 19–30.
45. *Id.*
46. Eric Martínez, Francis Mollica & Edward Gibson, *Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language*, COGNITION, July 2022 art. 105070, at 2.
47. *Id.* at 3.
48. *Id.*
49. *Id.* at 4–5.
50. Benson, *supra* note 2, at 527.
51. *Five Steps to Plain Language*, *supra* note 24.

and restrained use of just a few colors" within agency websites.[52] As Benson describes, overuse of formatting devices can overwhelm the reader and make it difficult to discern the meaning behind any particular graphical choice, such as the use of italics.[53] On the contrary, underuse of these devices can leave a document as "long, solid blocks of grey prose" that are themselves difficult to read and comprehend.[54] Successful plain writing must follow the Goldilocks rule when it comes to formatting—not too much and not too little.

Stefania Passera, from the Department of Industrial Engineering and Management at Aalto University in Finland, took this idea one step further and studied the effect of using visualizations in contracts.[55] After consulting with key stakeholders to understand the common misunderstandings of a traditional contract with a supplier, she reformatted the contract and added visualizations including timelines, charts of damage calculations, and a process diagram of the delivery terms.[56] Sure enough, respondents were able to understand the content of the visualized contract with greater speed and accuracy than had been possible with the more traditional, text-based contract.[57] Passera acknowledged that contracts are often inherently complex documents,[58] but she showed that it is possible to make a contract's complexities more understandable with informed formatting choices, centered around the target audience.

Of course, plain language only provides a benefit if a drafter's primary goal is clear communication to its intended audience. There might be scenarios where this is not true or where the intended audience is unclear. For example, a contract drafter might want to strategically keep a clause ambiguous in order to encourage signing by all parties. Alternatively, a drafter might prefer to use legalese to discourage laypeople from interpreting the document without counsel. Indeed, some might argue that the intended audience of a contract consists of the court, lawyers, and arbitrators.[59] However, if the intended audience of a legal document is the general public and there is no strategic value to ambiguity, a drafter should communicate as clearly as possible and therefore write with plain language.

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52. *2021 Federal Plain Language Report Card,* CENTER FOR PLAIN LANGUAGE, https://centerforplainlanguage.org/2021-federal-plain-language-report-card/ (last visited Dec. 20, 2022) [https://perma.cc/S68E-EMWX].

53. Benson, *supra* note 2, at 527.

54. *Id.*

55. Stefania Passera, *Enhancing Contract Usability and User Experience Through Visualization - An Experimental Evaluation*, 2012 16TH INT'L CONF. INFO. VISUALISATION 376, 376 (2012).

56. *Id.* at 377.

57. *Id.* at 379–80.

58. *Id.* at 376.

59. *See id.* (describing a "proactive approach" to contracting focused on the business audience instead of a judicial audience).

II. LEGALESE IN THE LAW

The written law, as opposed to contracts, applies to the entire population, much of which does not have access to a lawyer,[60] so the target audience of the written law should arguably always be the general public. Although there are likely edge cases for specialized areas of law, this Note assumes that, for the most part, the primary goal of a drafter of the written law is to communicate clearly to the public. Therefore, drafters of the law should take advantage of increased understandability of plain language and use plain language instead of legalese. Plain language rules for lawmaking in general would have a broader effect on our society than plain language rules for a specific industry or government agency.[61]

Although much of the existing research on plain language in law focuses on contracts and government communications, the lessons can easily be applied to drafting the law itself, which is primarily entrusted to lawyers. For example, in the Senate Judiciary Committee, legislation is usually drafted by lawyers who are staffers to specific senators, lawyers in the Office for Legislative Counsel, and lawyers who work for lobbyists.[62] The Senators themselves, whether or not they are themselves lawyers by training, "as a general rule . . . [do] not write the text of legislation."[63] Once a statute is enacted by Congress, it then goes to the Office of the Law Revision Counsel, where lawyers decide how to organize the statute into the greater U.S. Code.[64] Since lawyers are the drafters of the law, lawyers should bear the responsibility of improving the clarity of their communication.

Laws are often written in lofty legalese and are difficult to access by the general public. In today's world, the first step for anyone with a legal issue would probably be to Google their question. The search results will likely include plain language explanations of the law offered by various nonprofit groups, government offices, and law firms.[65] The reader of these results must trust these various interpretations and would be ill-equipped to resolve discrepancies between various sources. Because learning how to navigate state and federal law is not part of the standard high school curriculum, the average reader would not easily be able to consult the source material—the law itself. An entire professional class of lawyers has evolved in order to provide lay people with help in interpreting the law, but many people do not have access to a lawyer. And those who do have access to

60. *See infra* notes 76–78 and accompanying text.

61. Blasie, *supra* note 11, at 521.

62. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 584–90 (2002).

63. *Id.* at 585.

64. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1656–57 (2020).

65. For example, my Google search for "how to sue for custody" results in articles published by WomensLaw.org (a national nonprofit), the Colorado Judicial Branch Self-Help page, the Minella Law Group (a California law firm), and the Myers Law Firm (a North Carolina Law Firm). Although search results will vary depending on user and location, the types of results would likely be similar for any similar legal question entered into Google.

a lawyer would have to spend precious time and money on legal consultation to get even a basic understanding of a law written in legalese.

Despite this current lack of accessibility, laws have a large non-lawyer audience. For example, many public officials who are responsible for applying and enforcing statues have no legal training.[66] Additionally, law has an important *ex ante* function—to guide citizen conduct by making clear where the lines lie between legal and illegal conduct. This is especially important in criminal law, much of which differs from state to state.[67] And yet, an empirical study shows that many people seem to assume that the law simply represents their own moral understanding of what is right and wrong.[68] Residents of states with different criminal laws guessed similar verdicts for alleged criminal behavior, whether the behavior was actually criminal in their state or not.[69] This shows a basic lack of understanding of the law among the general population.

Furthermore, members of the public should be able to educate themselves on the law at their own initiative. They may want to consult statutes to understand the law and avoid litigation. One law professor described often seeing staff at the law library assist members of the general public who were trying to understand statutes.[70] If these members of the public cannot avoid litigation and end up in court, they might have to represent themselves as *pro se* litigants. *Pro se* representation is particularly prevalent in family law, where a survey in 1991 that looked at sixteen different urban centers found that over half of cases had at least one *pro se* litigant.[71] These litigants must be able to understand the law in order to effectively represent themselves.

Indeed, the Supreme Court has recently commented on the need for clear communication of the law to *pro se* litigants. In *Turner v. Rogers*, Mr. Turner had been incarcerated for civil contempt because he had "willfully" failed to pay child support as ordered by the court.[72] However, he had not received notice that his inability to pay was an affirmative defense.[73] The Court held that his incarceration was a violation of Due Process and that lower courts should have created procedural safeguards to "significantly reduce the risk of an erroneous deprivation of liberty."[74]

The core issue of this case is that Mr. Turner did not understand the law. Although his case centered on a misunderstanding of *common* law—the South Carolina Supreme Court had previously held that an *inability* to pay did not

66. Douglas E. Abrams. *Plain-English Drafting for the Age of Statutes*, MICH. BAR J., June 2009, at 50, 51.

67. John M. Darley, Paul H. Robinson & Kevin M. Carlsmith, *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 167 (2001).

68. *Id*. at 168.

69. *Id*. at 176.

70. Abrams, *supra* note 66, at 51.

71. Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants*, 82 JUDICATURE 13, 14 (1998).

72. Turner v. Rogers, 564 U.S. 431, 436–37 (2011); *See also* S.C. Code Ann. § 63-3-620.

73. *Turner*, 564 U.S. at 449.

74. *Id*. at 447.

reflect *willful* failure to pay[75]—the problem persists in cases or statutory and regulatory interpretation. A *pro se* litigant must be able to understand the law in order to have fair access to the judicial system that is mandated by Due Process.

And, as with any social justice issue, the negative impact of legalese in the law falls disproportionately on marginalized people in our society. People who can afford lawyers hire them, rendering it less necessary for them to understand the law themselves. However, despite the millions of dollars provided by the federal government to legal aid services, the indigent in America still do not have any representation in 80% of cases.[76] There simply aren't enough lawyers available to serve low-income individuals. According to the Legal Services Corporation, "[l]ow-income Americans did not receive any or enough legal help for 92% of their civil legal problems."[77] However, the persistence of the legal services gap demonstrates that even if legal aid funding across the country were doubled, the vast majority of legal needs for low-income Americans would go unmet. Although self-education and more accessible legal materials will never be a true substitute for legal counsel,[78] we must accept the reality that *pro se* representation is here to stay for the foreseeable future, and that we must therefore ensure that the law is comprehensible by the general public.

Finally, plain language would also benefit the legal audience of statutes and other rules. When two versions of the South African *Human Rights Commission Bill* were compared (one with plain English and the other in legalese), both law students and legal professionals were able to read the plain English version 7% more quickly and answer comprehension questions with 19% more accuracy.[79] This shows that even those who are trained to understand legalese will save time and effort if plain language were used in the law.

One common argument against plain language is that it sacrifices precision for the sake of simplicity.[80] According to this argument, legal concepts are so complex that they require complex language and should not necessarily be simplified to the point that a layperson could understand.[81] Some have even argued that using plain language instead of traditional legal terms could violate a lawyer's key ethical duties of competence, diligence, and communication because

75. Moseley v. Mosier, 306 S.E.2d 624, 626 (1983).

76. Katja Cerovsek & Kathleen Kerr, Note, *Opening the Doors to Justice: Overcoming the Problem of Inadequate Representation for the Indigent*, 17 GEO. J. LEGAL ETHICS 697, 697 (2004).

77. *The Justice Gap: The Unmet Civil Legal Needs of Low-income Americans*, LEGAL SERVICES CORPORATION, https://justicegap.lsc.gov/ (last visited Dec. 20, 2022) [https://perma.cc/2MBM-KUJ8].

78. *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 455 (2009).

79. Kimble, *supra* note 39, at 25.

80. *See, e.g.*, Rabeea Assy, *Can the Law Speak Directly to its Subjects? The Limitation of Plain Language*, 38 J.L. & SOC'Y 376, 379 (2011).

81. *Id.*

traditional legal terms have more predictable results in litigation.[82] However, plain language advocates such as Professor Kimble[83] argue the precise opposite—that plain language can be just as, if not *more* precise than its legalese counterpart.[84] A critic of plain language pointed out three errors in a converted plain language document to Professor Kimble, concluding that, due to the errors, the "turgid, repetitive, and (nearly) unreadable" original document was preferable.[85] In response, Professor Kimble simply incorporated three fixes into the plain language version of the document, demonstrating that precision can in fact be compatible with plain language.[86] In the words of Professor Kimble, although admittedly "some ideas can be stated only so clearly" and "practically no writing will be understandable to all readers," the goal of precision is too often used to justify "excessive detail" and becomes "a lame excuse for lame writing."[87] Although it can certainly be challenging to explain complex concepts in plain language, drafters are not absolved of the responsibility to *try* writing plainly.

Statutes are a particularly good candidate for plain language reform in the current environment because of the recent emphasis on using "ordinary meaning" in statutory interpretation. Although there is disagreement on what "ordinary meaning" is and how it is determined, there is consensus that "ordinary meaning" is a useful factor to consider when determining how to interpret a statute.[88] Even though the current debate focuses on the "ordinary meaning" of specific words as opposed to entire rules and statutes,[89] the underlying motivations of considering "ordinary meaning" reveal a concern and deference to the general public as a primary consideration in determining the meaning of a statute. But in order to defer to the general public on the meaning of a statute, the statute has to be comprehensible by the general public. As of now, the ABA claims that statutes are drafted to "minimize misinterpretation," but not necessarily from the perspective of the public.[90]

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82. *See* Lori D. Johnson, *The Ethics of Non-Traditional Contract Drafting*, 84 U. CIN. L. REV. 595, 609–10 (2016). Although Johnson examines the risks of converting traditional terms to plain language in contracts, her warning about the increased unpredictability of new, plainer phrasing is relevant to the law-drafting context as well.

83. See *supra* note 39 and accompanying text for additional discussion of some of Professor Kimble's work.

84. *See* Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 SCRIBES J. LEG. WRITING 109, 114 (1998–2000).

85. *Id.* at 111.

86. *Id.* at 115.

87. Kimble, *supra* note 39, at 31–33.

88. *See, e.g.*, Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1739, 1772, 1825 (2020) (demonstrating the consideration of ordinary meaning of a term in multiple disagreeing opinions by Supreme Court Justices).

89. *See, e.g.*, Tammy Gales and Lawrence M. Solan, *Revisiting a classic problem in statutory interpretation: Is a minister a laborer?*, 36 GA. ST. U. L. REV. 491, 491 (2019) (examining the ordinary meaning of "labor"); Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2203 (2017) (arguing that the rationale of relying on textualist methods such as dictionaries in statutory interpretation is to discover the "meaning attributed to words by ordinary English speakers").

90. *Five Tips for Reading Legislation and Code*, AM. BAR ASS'N, https://www.americanbar.org/groups/government_public/resources/public_lawyer_career_center/Career_Articles/gruwell-article-five-tips-reading-legislation/ (last visited Dec. 20, 2022) [https://perma.cc/2HXU-MYQW].

Indeed, the ABA offers "Five Tips for Reading Legislation and Code," basically admitting in the process that reading statutes requires specialized knowledge and skill not possessed by the general public.[91]

III. A MODEL RULE SOLUTION

A. THE IMPACT OF *MODEL RULES* ON THE LEGAL PROFESSION

A new Model Rule of Professional Responsibility is not the only path to setting plain language standards for the written law. There are alternative points of entry for regulating professional conduct. Although the legal profession has generally accepted that self-regulating institutions like the ABA can and should be responsible for drafting model rules of professional conduct, that responsibility could instead fall to other institutions.[92] For example, Congress could build off the Plain Writing Act and pass legislation to create enforceable writing standards for laws promulgated by federal agencies. Congress could also apply these standards to its own statutory drafting. Alternatively, administrative agencies could, themselves, set writing standards for rule-writing. Since 90% of federal policy is set by administrative agencies instead of by Congressional statutes, [93] this strategy could effectively target the majority of federal law that citizens consume. Such standards would have the advantage of being informed by non-lawyers, in contrast to the ABA Rules.[94]

Furthermore, the *ABA Model Rules* are just models, and they are not enforceable in any jurisdiction until the courts in that jurisdiction adopt the rules.[95] State courts have created plenty of variety in their adopted rules of professional conduct and, even if they primarily follow the *Model Rules'* wording and structure, they are not always quick to adopt amendments. For example, the most recent amendments (adopted in 2018) restructured Part 7 of the *Model Rules*, Information About Legal Services, in order to "[s]treamline and simplify the rules."[96] One such simplification was repealing Rule 7.5 about firm names and letterheads and moving the bulk of those provisions to the commentary on Rule 7.1, which describes misleading communications about a lawyer's services generally.[97] As of November

91. *Id.*

92. *See* Jason Mehta, *The Development of Federal Professional Responsibility Rules: The Effect of Institutional Choice on Rule Outcomes*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 57, 61 (2007).

93. David Nelson & Susan Webb Yackee, *Lobbying Coalitions and Government Policy Change: An Analysis of Federal Agency Rulemaking*, 74 J. POL. 339, 340 (2012).

94. Mehta, *supra* note 92, at 98.

95. Robert M. Buchholz, Cassidy E. Chivers, Noah D. Fiedler, Alyssa A. Johnson, Katherine G. Schnake, Joanna L. Storey & Suzanne M. Walsh, *Regulation of the legal profession in the United States: overview*, THOMSON REUTERS PRACTICAL LAW, https://uk.practicallaw.thomsonreuters.com/2-633-6340 (last visited Dec. 20, 2022) [https://perma.cc/PRW7-Y9PB].

96. *Report to the House of Delegates*, Am. Bar Ass'n 15 (Aug. 2018).

97. *Id.* at 2, 12, 15.

2022, only eleven states have adopted this change.[98] Another example is Rule 8.4(g), a provision against discrimination and harassment that was added to the *Model Rules* in 2016 but had only been adopted in four states by July 2022.[99] These examples indicate that state courts are often not immediately responsive to changes to the *Model Rules*.

One might reasonably ask how the *Model Rules* could be an effective way of influencing the legal profession's writing standards when amendments to the Rules can take years to be adopted. However, of all the alternative bodies that *could* enforce standards of plain writing, the ABA has the widest reach. Congress would be limited to the federal government, state courts could only affect their own jurisdiction, and administrative agencies could only impact their own agency. *ABA Model Rules*, on the other, would have an impact on the entire legal profession nationwide.

The *Model Rules* are also unique in their ability to affect legal training on a nationwide scale. The Multistate Professional Responsibility Exam, which aspiring lawyers must pass to be admitted to the bar in most states,[100] focuses, in large part, on the *ABA Model Rules*.[101] As a result, law schools across the country require students to take a course on Professional Responsibility that also focuses on the *ABA Model Rules*. In theory, budding lawyers are all familiar with the contents of the *ABA Model Rules* and how they apply to real-life situations. If these rules included provisions on plain writing, then perhaps the MPRE would add questions that challenge aspiring lawyers to identify common flaws in passages filled with "legalese." In that case, an entire generation of new lawyers would be trained to spot legalese and learn how to avoid it in their own future work.

In contrast, law students today are not required to practice legal writing for a lay audience. A quick look at the Legal Writing Institute's survey of legal writing programs illuminates gaps in the way legal writing is currently taught.[102] The bulk of required legal writing courses (477 out of 550 surveyed) were focused primarily on "objective (including predictive) legal analysis and writing," "basic persuasive writing," or a combination of the two.[103] These classes focus on teaching students to write for other legal professionals in formats such as memos and

98. This includes AZ, CT, MA, NE, NM, TN, TX, VA, UT, WA, WY. A comparison of all corresponding state rules to Model Rule 7.1 can be found in the American Bar Association's report on state variations from the *Model Rules*. *Variations of the ABA Model Rules of Professional Conduct: Rule 7.1*, AM. BAR ASS'N (July 2022).

99. David Bayne, *Is NY's New Professional Conduct Rule 8.4(g) Heading to the Courts?*, N.Y.L.J. (July 15, 2022) https://www.law.com/newyorklawjournal/2022/07/15/is-nys-new-rule-of-professional-conduct-8-4g-heading-to-the-courts/ [https://perma.cc/5H5V-EKGF].

100. *About the MPRE*, NATIONAL CONFERENCE OF BAR EXAMINERS, https://www.ncbex.org/exams/mpre/ (last visited Dec. 20, 2022) [https://perma.cc/5AK9-ZFXL].

101. *Preparing for the MPRE*, NATIONAL CONFERENCE OF BAR EXAMINERS, https://www.ncbex.org/exams/mpre/preparing (last visited Dec. 20, 2022) [https://perma.cc/C8ZX-S7G2].

102. *See generally ALWD/LWI Legal Writing Survey, 2020–2021*, ASS'N LEGAL WRITING DIRS. & LEGAL WRITING INST.

103. *Id*. at 17–18 (using numbers of surveys responding "Yes" to the question "Was the course required").

briefs. The only relatively frequent assignment format with a lay audience was a client letter, which was assigned in approximately one-third of the required introductory courses.[104] In contrast, approximately 75% of these introductory courses assigned a memo and approximately 50% assigned a brief.[105]

The focus on memos and briefs makes sense—both require law students to learn how to analyze case precedent and apply it to a unique fact pattern with a case comparison. However, this kind of writing, which is focused on legal analysis and case precedent, does not challenge law students to think of writing for a diverse audience. As a result, a majority of law students graduate into the world without any significant training on how to write for a nonlegal audience. This lack of training negatively impacts the legal profession as a whole because new lawyers enter a workforce that expects them to write competently for legal and nonlegal audiences. By learning on the job, they are exposed to written material that was not necessarily crafted with plain language principles in mind. It is inevitable that existing preferences for overly formal, convoluted, unintelligible writing styles will survive successive generations of lawyers in the absence of further intervention. This negatively impacts the quality of any written work from the legal profession that is consumer-facing, and, as discussed above, also has strong consequences in the context of statutes and rules.

Education and training on other rules of ethics have had a measurable effect on the legal profession. Currently, a lawyer's ethics education often consists of three parts: preparation for the MPRE, a professional responsibility course during law school, and continuing ethics courses for active attorneys that focus on specific areas of practice.[106] The most significant variance of requirements across U.S. jurisdictions comes in the latter category, *i.e.*, the Mandatory annual hours of Continuing Legal Education (MCLE) that are specifically focused on ethics. States require between zero and 2.33 hours of ethics education every year.[107] Empirical studies have shown that each additional hour of mandatory annual ethics training reduces the number of charges of attorney ethical misconduct by 10.5%.[108]

Because the *Model Rules* have a significant impact on the training of lawyers across the nation, and ethics training has a measurable impact on adherence to the *Model Rules*, the *Model Rules* are an ideal place to encourage adoption of plain language throughout the profession. However, the natural follow-up question is a difficult one: *how* can we incorporate a plain language obligation into the existing *Model Rules*?

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104. *Id.* at 37, 41, 45.

105. *Id.* (using the number of surveys that responded "Yes" to assigning a memo or a brief, choosing only the relevant assignment with the highest positive response in each dataset to avoid double-counting classes).

106. Frank Fagan, *Reducing Ethical Misconduct of Attorneys with Mandatory Ethics Training: A Dynamic Panel Approach*, REV. L. & ECON., Nov. 2019 art. 20170049, at 2.

107. *Id.* at 3.

108. *Id.* at 14.

B. INCORPORATING PLAIN LANGUAGE RESPONSIBILITIES INTO THE *MODEL RULES*

A rule on using plain language in the written law would align with the underlying purpose and values of the *Model Rules of Professional Conduct* because it would add clarity to a lawyer's ethical obligations to the general public. Although much of the *Model Rules* focuses on the relationship between lawyer and client, the *Model Rules* have always aimed to define ethical obligations beyond that relationship. In the very first sentence of the preamble, the *Model Rules* define three distinct roles for a lawyer: "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[109] This lists the lawyer-client relationship as just one of three sources of ethical obligations for a lawyer.

Some of the rules themselves are linked to the duty of a lawyer as a public citizen. For example, the entire fourth chapter refers to "transactions with persons other than clients."[110] Although the rules in this chapter are by no means extensive (they deal generally with preventing lawyers from being malicious to third parties), they still reveal an accepted notion that lawyers have an ethical obligation to the general public beyond their clients. Indeed, the comments to Rule 4.4 remind us that "[r]esponsibility to a client . . . does not imply that a lawyer may disregard the rights of third persons."[111] Additionally, the *Model Rules* have had a form of recommended pro bono service for persons of limited means since 1983, and even before its adoption, it was debated whether or not pro bono service should be mandatory.[112] Even though the pro bono rule never became mandatory in the *Model Rules*, it shows a recognition of a higher purpose and a duty of lawyers to the general public.

However, in other ways, a rule on plain language drafting in the law would clash with the existing structure and content of the *Model Rules*. For example, there is currently no obvious place in the *Model Rules* for such a rule. This is because, despite the three distinct roles defined in the preamble, the *Model Rules* are structured with what legal scholar Eli Wald called a "hired gun bias," i.e., a bias towards the role of a client representative.[113] Few rules expound upon a lawyer's duties as an "officer of the legal system" or as a "public citizen" without subordinating those duties to a lawyer's client obligations.[114] Although it would be tempting to incorporate plain writing into Rule 1.1 on "Competence,"[115] this

109. MODEL RULES OF PROF'L CONDUCT pmbl. (2018) [hereinafter MODEL RULES].

110. MODEL RULES CH. 4.

111. MODEL RULES R. 4.4.

112. Cerovsek & Kerr, *supra* note 76, at 699; *see also* MODEL RULES R. 6.1.

113. Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 247–50 (2014).

114. *Id.*

115. This was the strategy proposed by Professor Debra R. Cohen, who argued that the *Model Rules* should require competent legal writing, but did not consider the context of the written law. *See* Debra R. Cohen, *Competent Legal Writing - A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491, 519 (1999).

rule only defines "Competence" in the context of a client-lawyer relationship.[116] Wald also argued that the *Model Rules* have a litigator bias because, although many of the rules formally address lawyers as a whole, the bulk of the official commentary in the rules addresses litigation-specific scenarios, "often leav[ing] non-litigators without guidance."[117] Because of the hired-gun bias and the litigator bias, the *Model Rules* do not have a natural spot to add a rule on using plain language in the written law, which would create an obligation to *non*-clients for *non*-litigators.

Another clash arises from the fact that the *Model Rules* themselves fail to incorporate many plain language elements. For example, the rules use the ambiguous verb "shall" to indicate obligation,[118] even though plain language advocates recommend using "must" in its place.[119] More importantly, many of the *Model Rules* are written in a formal, complex style that is difficult to understand. Consider, for example, Rule 1.5(c), regarding contingent fees:

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.[120]

Like many of the *Model Rules*, this clause uses long sentences, avoids pronouns, and fails to organize and format the information in an easily understandable way. A plain language version could look like:

> **(c) Contingent fees**
>
> (i) You may charge a fee that is contingent on the outcome of a legal matter, unless prohibited by paragraph (d) or other law.
>
> (ii) If you charge a contingent fee, your client must sign an agreement stating:

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116. MODEL RULES R. 1.1. (defining "Competence" in the "Client-Lawyer Relationship" chapter of the *Model Rules*).

117. Wald, *supra* note 113, at 245–47.

118. MODEL RULES pmbl., cmt. 14.

119. *See, e.g.*, Kimble, supra note 39, at 7.

120. MODEL RULES R. 1.5(c).

> (1) Any legal expenses that your client must pay, regardless of the outcome of the matter.
>
> (2) Any legal expenses that your client must pay out of recovery if your client prevails, separate from the contingent fee.
>
> (3) The contingent fee as a percentage of recovery in the event of settlement, trial, or appeal. You must specify whether to calculate the percentage of recovery before or after deducting legal expenses.
>
> (iii) After the matter concludes, you must notify your client in writing of the outcome and the calculation of any fees or expenses that your client owes you.

This version of Model Rule 1.5(c) is clearer than the original and uses 20% fewer words. Nevertheless, the ABA should not adopt this change in isolation because the language would be distractingly different from the rest of the *Model Rules*. The *Model Rules* do not make use of plain language elements such as bolded headings or the second person. Even though the *Model Rules* have a technical audience (lawyers) and therefore arguably have good reason to use technical language, any rule asking lawyers to use plain language when the rules themselves do not would seem hypocritical.

One possible solution would be to restructure the *Model Rules* as a whole. This is what Wald suggested, though his primary motivation was to "resize" the rules to broaden their applicability to the wide variety of legal careers.[121] Professor Wald suggested elevating the duties of a lawyer as an officer of the legal system and as a public citizen.[122] If the *Model Rules* had an entire section for duties as an "officer of the legal system," a rule on plain language when drafting laws would fit in well there. This rule would guide any lawyer with a law-drafting responsibility, from the lawyers at the Office of the Legislative Counsel to in-house lawyers at lobbyist organizations that propose statutes to state and federal legislatures. In the course of restructuring, the existing rules could incorporate more plain language elements as demonstrated with Rule 1.5(c) above.

The rule itself could be simple. It would not *require* plain language use—whether a written document qualifies as "plain language" is a subjective inquiry, so such a requirement would be difficult to enforce. By using permissive language, the Rule would allow a lawyer professional discretion in following the rule, without threat of enforcement.[123] Even a new permissive Rule could impact professional responsibility education in law schools across the country. And, as the success of the Plain Writing Act shows, a rule on writing standards can measurably improve writing quality even when the rule has little enforcement power.[124] However, like the Plain Writing Act, the rule could require lawyers

121. Wald, *supra* note 113, at 266.
122. *Id*.
123. MODEL RULES pmbl., cmt. 14.
124. *See supra* notes 34–37 and accompanying text.

with the requisite authority to set up internal policies and procedures within their workplaces that foster the use of plain language.[125] This requirement could be grounded in Rule 5.1, which governs "Responsibilities of Partners, Managers, And Supervisory Lawyers,"[126] and its compliance would be relatively easy to objectively assess.

The rule should also define "plain language" in a way that supplements existing definitions across different jurisdictions. By placing the definition in the commentary instead of in the text itself, the definition would provide helpful guidance but leave the rule itself as an abstract descriptive standard, like most existing plain language laws.[127] In the proposed version below, I have used the definition from the Plain Writing Act[128] and listed a few common elements of "plain language" provided by the Plain Language Action and Information Network.[129]

> **You have a professional responsibility to use plain language when drafting a rule or law that applies to the general public.**
>
> Comment
>
> [1] Plain language is clear, concise, and follows best practices appropriate to the subject or field and intended audience. Examples of plain language elements include:
>
> • Logical organization
>
> • The active voice
>
> • Common, everyday words
>
> • Short sentences and paragraphs
>
> • "You" and other pronouns
>
> You should look to applicable law for further guidance on plain language.
>
> [2] If you have managerial or supervisory authority over other lawyers, you should make reasonable efforts to ensure that those lawyers conform to this rule. See Rule 5.1. Such efforts should include internal policies and procedures to encourage conformity with this rule. See Comment 2 to Rule 5.1. Such efforts may also include periodic training and workshops, depending on the size of the firm. See Comment 3 to Rule 5.1.

The wording of the suggested rule is arguably not precise enough to give the rule enough heft. After all, what rules or laws apply to the general public? Do statutes related to bankruptcy, civil procedure, and other specialized fields of

125. *See id.*

126. MODEL RULES R. 5.1.

127. *See supra* note 28 and accompanying text.

128. Plain Writing Act of 2010 § 3(3), 5 U.S.C.A. § 301 note.

129. *The Elements of Plain Language*, PLAIN LANGUAGE ACTION AND INFORMATION NETWORK, https://www.plainlanguage.gov/resources/articles/elements-of-plain-language/ (last visited Dec. 20, 2022) [https://perma.cc/6TYP-C88L].

knowledge apply to the general public?[130] However, I would argue that this ambiguity would help the greater cause of training lawyers in their plain writing skills. By asking them to consider whether or not their rules "apply to the general public," the Rule would force lawyers to consider their audience, which the Center for Plain Language identifies as the first step to writing in plain language.[131]

IV. CONCLUSION

This Note has suggested some fairly significant updates to the *Model Rules*. The ABA might be unwilling to restructure the *Model Rules* to add a new chapter for duties of lawyers as officers of the legal system, or less than enthusiastic about rewriting the entire *Model Rules* in plain language. Even so, it would be worthwhile to add the simple rule written above, encouraging lawyers to consider the general public when drafting laws. This, even if added in the commentary to existing rules on Competence or Communication within the client-lawyer relationship, could have a significant impact on the prevalence of plain language in our laws for years to come.

Ultimately, lawyers are professional writers. Society trusts lawyers to have strong communication skills and the ability to clearly draft the law that governs our society. Lawyers therefore have a professional responsibility to use plain language when drafting the law. Our *Model Rules* should reflect that responsibility so that our laws are as clear as justice requires.

130. Peter Tiersma suggests that many statutes "are not directed to the general public at all, but are rather addressed to a subcommunity of experts." Peter Tiersma, *The Plain English Movement*, http://www.languageandlaw.org/PLAINENGLISH.HTM (last visited Dec. 20, 2022) [https://perma.cc/79G9-CKGS].

131. *Five Steps to Plain Language*, *supra* note 24.