PERSUADING JUDGES:

AN EMPIRICAL ANALYSIS OF WRITING STYLE, PERSUASION, AND THE USE OF PLAIN ENGLISH

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INTRODUCTION

A litigator's objective is to persuade judges. With oral arguments occurring at a steadily decreasing frequency and with full trials becoming a rarer occurrence, judges increasingly make their decisions based on the litigator's written work-product.[1] Hence, as a lawyer, persuasiveness of your writing is, therefore, paramount to your success. And although the legal merits of an argument ultimately persuade—not your writing style—this fact should not fool you into thinking that your choice of writing style is unimportant.[2] Writing style is important. How you choose to

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1. Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brook. L. Rev. 685, 700 (2001) (noting that federal appellate courts "have cut back dramatically on oral argument," deciding nearly 60 percent of cases without oral argument); Marc Galanter & Mia Cahill, "*Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1340 (1994) (stating that only 7 percent of cases go to trial).

2. This Article does not support the proposition that a litigator's writing style will make up for a meritless argument. Several judges in this study noted that the argument's merits persuade, not writing style. For example, after indicating her preference and commenting on the use of contractions in a legal brief, one judge noted,

> Let me also say that the style of the writing is unlikely to "persuade" me. The outcome depends on the merits, entirely. It is easier, however, to sell the arguments

deliver your message affects whether you are effective at communicating the merits. Indeed, a well-written pleading accurately conveys the argument's merits without frustrating the reader with superfluous words or distractions. But a poorly-written pleading can lose or frustrate its reader. Whether a lost reader re-reads the pleading or simply gives up, the author has at best frustrated the judge and at worst so alienated the judge that the author's arguments go unread or misunderstood. That cannot be persuasive. Thus, you may have the better legal argument, but if you fail to effectively communicate that merit, you may lose. Or, moreover, if your opponent has the superior legal position but she fails to highlight it effectively, you may win both because the judge understands your argument and your opponent did such a poor job of communicating that she failed to convey the merits on her side.

So what is the best way to highlight your argument's merit? Obviously, this is a difficult question and the answer will depend upon the circumstances unique to each case. Much has been written about the order of arguments, the use of authority, etc. This Article does not deal with those issues; this Article is about writing style. While much has been written on writing style, little empirical data exist to support what style best delivers the author's intended message.[3]

So what writing style is most effective? In recent decades, academics and some judges have urged the legal community to write in Plain English.[4]

> presented in the [Informal sample]. [But] [j]ust for the record, I and other members of my court have been 'persuaded' by a handwritten pro se brief.

The point this federal appellate judge makes is dead on—while the writing style of the pleading will not necessarily make up for a lack of merit, a well-written pleading can communicate the issues and arguments and highlight them in the way that is most helpful to the author's position. *See also* 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, 304–305 (1987) (quoting a judge as writing, "That a decent writing style is appreciated by a busy jurist is 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." (Emphasis in original)).

3. This Article assumes that the attorney has a choice in writing style. While some lawyers may not have the skill necessary to choose their writing style, most do.

4. *See* Bryan A. Garner, *Judges on Effective Writing: The Importance of Plain Language*, 84 Mich. B.J. 44 (Feb. 2005); Joseph Kimble, *The Elements of Plain Language*, 81

But does Plain English work? Does it help litigators persuade judges?

This Article attempts to answer that question. I sent surveys and writing samples to 800 judges across the country asking which of the samples was most persuasive. The survey also asked about the judges' gender, age, years of experience in law, years on the bench, and whether the judges sat in rural or urban districts.

Part I of this Article discusses what Plain English is and what it is not. Part II discusses the existing empirical data relating to Plain English. Part III discusses the methodology of the survey, and Part IV discusses the survey's results. Finally, Part V concludes and addresses how this study should influence future writing-style decision-making.

I. WHAT PLAIN ENGLISH IS AND WHAT IT IS NOT

The Plain English movement can be traced back to at least David Mellinkoff's 1963 classic *The Language of the Law*.[5] In the 1970s, several state legislatures began requiring companies to write consumer contracts in Plain English and President Carter issued an executive order directing federal regulators to draft rules using language "as simple and clear as possible."[6] The movement encouraged lawyers to draft not only consumer documents in Plain English but also pleadings to the court.[7] But what is Plain English?

Like many legal terms, "Plain English" is vague and difficult to define.[8] Although there are guidelines, Plain English allows for situational decision-making, leaving the author to use his or her best judgment.[9] The basic idea behind it is to make the document as reader-friendly as possible to get the message across. Joseph Kimble provided the most comprehensive and specific instructions

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Mich. B.J. 44 (Oct. 2002).

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

6. Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 Thomas M. Cooley L. Rev. 1, 2 (1992).

7. *See generally id.*

8. *Id.* at 14. Bryan Garner has written, "Some have tried to reduce 'plain language' to a mathematical formula, but any such attempt is doomed to failure. . . . 'Like so many legal terms, it is inherently and appropriately vague.'" Bryan A. Garner, *Garner on Language and Writing* 295 (ABA 2009) (quoting Kimble, *supra* n. 6, at 14).

9. *See* Kimble, *supra* n. 6, at 18.

for how to write in Plain English in 1992.[10] Kimble writes, "As the starting point and at every point, design and write the document in a way that best serves the reader. Your main goal is to convey your ideas with the greatest possible clarity."[11] He goes on to name specific techniques an attorney can use to increase readability.[12] They include the use of headings; topic sentences to summarize the main idea of paragraphs; short, direct sentences; the active voice; lists and bullet points; familiar voice and familiar words (usually shorter words); and the omission of unnecessary facts or details.[13] The more complex the idea, the greater the need for a shorter sentence.[14] But brevity is not the goal. The goal is to communicate effectively. Plain English advocates do not seek brevity at the expense of "substance, accuracy, or clarity."[15] Sentences sometimes have to be long to be clear, accurate, and easy to understand.[16] But legal writers often overestimate this need.

Plain English is not baby talk or a "simplified version of the English language."[17] Plain English advocates promote writing that is "as simple and direct as the circumstances allow. Not simplistic or simple-minded. Not Dick-and-Jane. Not street talk or slang. But the style you would use if your readers were sitting across the table, and you wanted to make sure they understood."[18]

Plain English can often be defined by its opposite—stilted, formalistic writing known as "Legalese."[19] Legalese uses long words and long sentences containing multiple ideas.[20] It uses archaic words and passive voice, and it often has illogical ordering

10. *Id.* at 2; *see also id.* at 44.
11. *Id.* at 44.
12. *Id.* at 44–45.
13. *Id.*
14. Steven D. Stark, *Writing to Win* 33 (Main St. Bks. 1999).
15. Wayne C. Schiess, *What Plain English Really Is*, 9 Scribes J. Leg. Writing 43, 63 (2003–2004).
16. *See id.* at 64–65 (stating that the desire for brevity is often sacrificed to ensure accuracy, clarity, and ease for the reader).
17. Kimble, *supra* n. 6, at 14 (quoting Robert D. Eagleson, *Writing in Plain English* 4 (Austrl. Govt. Publg. Serv. 1990)). Professor Eagleson is a Plain English expert from Australia.
18. *Id.* at 19.
19. Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. Rev. L. & Soc. Change 519, 522–523 (1984–1985).
20. *Id.* at 523–525.

of ideas.[21] It has the appearance of extreme precision but often results in confusion, instead of precision.[22]

Some would argue that it is obvious that Plain English is more persuasive that Legalese. But as this study will indicate, many people still prefer the Legalese style.[23] Perhaps some judges prefer Legalese because they have been trained since entering law school to prefer it. Law students spend three years reading court opinions written in Legalese[24] and thus become accustomed to its tone and style and believe that is the way lawyers must write. Or perhaps lawyers prefer Legalese because they want their writing to sound worthy of the $300 an hour they charge their clients.[25] After all—as some lawyers will state—if a client can understand the lawyer's written work product and thinks he can do the job himself, the client will be less likely to hire the attorney again.

II. EXISTING EMPIRICAL SCHOLARSHIP COMPARING PLAIN ENGLISH TO LEGALESE

Only a few researchers have empirically investigated with writing samples whether judges prefer Plain English to Legalese. Each study found that judges prefer Plain English.[26]

In 1987, Steve Harrington and Joseph Kimble sent surveys to 300 judges and 500 lawyers in Michigan.[27] The surveys asked the respondents to indicate their preferences between six pairs of legal passages; each pair contained a passage in Plain English and

21. *Id.*

22. *Id.* at 526.

23. *See infra* sec. IV(B) (noting that one-third of judges prefer Legalese over Plain English).

24. *See* Kimble, *supra* n. 6, at 11.

25. Steven Stark, *Why Lawyers Can't Write*, 97 Harv. L. Rev. 1389, 1390 (1984) (noting that the reason lawyers write poorly is perhaps an intentional way to make their written work product seem erudite and, thus, justify their billable rate).

26. Other articles have discussed judges' views of Plain English. These articles have added much needed depth and breadth to the existing literature. But only a few of the articles have tested judges' preferences by using writing samples. *See e.g.* Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. Leg. Educ. 80, 84 (2003). Testing judges' preferences with writing samples is important because it is one thing to ask judges what they prefer but it is another to *see* what they prefer. *See infra* n. 57 and accompanying text.

27. Steve Harrington & Joseph Kimble, *Survey: Plain English Wins Every Which Way*, 66 Mich. B.J. 1024 (Oct. 1987).

passage in Legalese.[28] The passages were brief (sometimes only a sentence long) and were not in the context of a legal document.[29] Indeed, all six passage-pairs fit onto one piece of paper.[30] Sixty percent of the judges and forty-nine percent of the lawyers responded to the survey.[31] Nowhere in the cover letter or in the survey did the words "Plain English" appear; the cover letter stated that the survey was part of a student research project.[32] The study's results showed that judges preferred the Plain English passages by a wide margin.[33] On average, the judges preferred the Plain English passage to the Legalese passage 85 to 15 percent.[34]

In 1990, Joseph Kimble and Joseph A. Prokop, Jr. published the results of similar studies done in Florida and Louisiana.[35] The researchers sent the same survey and passage-pairings used in the Michigan study to a larger, more geographically diverse respondent pool.[36] The surveys were sent to 558 judges and 558 lawyers in Florida and 247 judges in Louisiana.[37] The results in both states were similar to the Michigan results—judges in Florida and Louisiana preferred the Plain English passages 86 percent and 82 percent of the time, respectively.[38]

But the Michigan, Florida, and Louisiana studies are more than twenty years old.[39] Additionally, because the surveys used a one-page, six-question stimulus,[40] the respondents had to state their preferences outside the context of a legal document. Thus, the studies only show which sentence or group of sentences judges preferred. The studies did not purport to be a direct measure of the persuasiveness of Plain English.

Most importantly, though, because these studies asked the respondents to state their preferences outside the context of a le-

28. *Id.*
29. *Id.* at 1025.
30. *Id.*
31. *Id.*
32. *Id.* at 1024.
33. *See id.* at 1026.
34. *Id.* at 1025.
35. Joseph Kimble & Joseph A. Prokop, Jr., *Strike Three for Legalese*, 69 Mich. B.J. 418, 418 (May 1990).
36. *Id.* at 418–420.
37. *Id.* at 419.
38. *Id.* at 420.
39. *Id.* at 418.
40. *Id.* at 419–420.

gal document and in the context of a passage-by-passage comparison, the respondents had to think objectively about which passages they preferred. When a judge reads a pleading, the judge does not go through that same process. Instead, the judge reads the pleading and determines whether the argument is persuasive. Thus, if we truly want to know whether judges find Plain English more persuasive, the samples we provide to them must be pleadings, and we need to ask them explicitly which is more persuasive.

Robert W. Benson and Joan B. Kessler conducted the only other study that attempted to determine if judges prefer Plain English to Legalese.[41] In that study, an extern at the California Court of Appeals, Second District, in Los Angeles surveyed thirty-three research attorneys and ten judges.[42] The extern gave the participants two different one-paragraph passages excerpted from two separate briefs.[43] These constituted the Legalese excerpts.[44] Other participants were given the same two one-paragraph passages rewritten in Plain English.[45] Participants were asked to fill out a twenty-two question survey, and the researchers then compared the responses of those who read the Legalese passages to the responses of those who read the Plain English passages.[46] The survey asked about persuasiveness, but it also asked about content and the writer's credibility, credentials, and qualifications.[47] The results indicate that the participants found the Legalese passage to be less persuasive than the Plain English version.[48] The respondents also believed the Plain English author was more believable, well-educated, and worked for a prestigious law firm.[49]

Although this study added to the literature in a meaningful way, the study's results are open to some potential criticisms. First, the majority of the respondents were not judges (over 75 percent of those surveyed were research attorneys).[50] Second, the

41. Benson & Kessler, *supra* n. 2.
42. *Id.* at 305.
43. *Id.* at 306–309.
44. *Id.* at 306.
45. *Id.*
46. *Id.* at 311–313.
47. *Id.* at 316.
48. *Id.* at 313–314.
49. *Id.*
50. *Id.* at 305.

number of judges surveyed was small—the study only surveyed ten judges.[51] Thus, a one- or two-judge swing could have dramatically changed the results. Third, the sample was chosen from a single court in one of the biggest, most cosmopolitan cities in the country.[52] The study is open to the criticism that its findings about a Los Angeles litigator—making the decision about what writing style to use in a brief—might not readily apply to a court outside of Los Angeles. One might argue that even if a lawyer wants to write in Plain English, judges in Little Rock or Lancaster—for example—might prefer Legalese and, thus, the results of a study conducted in Los Angeles cannot automatically be applied to other areas. Lastly, the passages were, once again, short excerpts.[53] Pleadings are usually not short—they are certainly not one paragraph. One reason why Plain English advocates promote Plain English is that Legalese's unnecessary complexity will sometimes lose the reader, making the document less clear and, thus, less effective at communicating ideas.[54] If the respondents see a short excerpt, they are less likely to get lost in the complexity and more likely to focus on the argument's merit than they would if they were reading a longer document. Thus, a study that uses short excerpts might not measure Plain English's effectiveness as accurately as a study that uses longer, legal documents.

My research attempts to build on this existing scholarship in a new, more comprehensive study.

III. METHODOLOGY

A. General Methodology

My goal was to determine if judges found Plain English more persuasive than Legalese. A lawyer's objective is to persuade; therefore, the most important question is whether the use of Plain English will help the lawyer achieve that objective. I sent 800 surveys to judges across the United States. I sent 200 surveys to each of four different cohorts:

(1) federal trial judges;
(2) federal appellate judges;

51. *Id.*
52. *Id.*
53. *Id.* at 306–311.
54. Ruth Bader Ginsburg, *Foreword*, in Garner, *supra* n. 8, at xiii.

(3) state trial judges; and
(4) state appellate judges.

Each judge received two excerpts from a potential pleading (the "writing samples"[55]), a cover letter, a survey, and a self-addressed, stamped envelope. Half of each cohort received a Plain English sample and a Legalese sample and the other half received an Informal sample[56] and a Legalese sample. The argument in each sample was essentially the same. The surveys asked the judges to indicate which of the two writing samples they thought was more persuasive.

Asking the judges which writing sample is more persuasive is better than asking a series of pointed questions, detailing the "elements"[57] of Plain English. First, it addresses the ultimate question we want answered. Second, asking a series of questions requires the survey respondent to objectively and independently consider which of the Plain English "elements" the respondent prefers out of context. But persuasion is a subtle process, and what judges say persuades them out of context might not be what actually persuades them.[58] Third, from a practical perspective, asking one question instead of a series of questions is better because it keeps the survey short, ensuring the response rate will not suffer because of a lengthy questionnaire.[59]

It is also important to ask judges to indicate their preference in the proper context. Rather than providing the judges with several isolated sentences or groups of sentences (as in the Michigan, Florida, and Louisiana surveys),[60] I wanted to simulate a plead-

55. *See* apps. 1–6.

56. "Informal" refers to a sample written in Plain English taken to an extreme. *See infra* sec. III(C).

57. For example, asking, "Do you prefer the use of the active or passive voice? Do you prefer complex language or simple language? What do you think about using the first person in a pleading?" *See* Kimble, *supra* n. 6, at 44–45.

58. As Benson and Kessler point out, there is good reason to believe that judges may say they prefer one thing but actually prefer another—teachers do. *See* Benson, *supra* n. 2, at 303 n. 22 (citing Rosemary L. Hake & Joseph M. Williams, *Style and Its Consequences: Do As I Do, Not As I Say*, 43 College English 433 (1981)). Benson and Kessler state that Hake and Williams found in their studies that "a group of college English teachers gave higher grades to papers with syntactically complex writing than to papers written simply." *Id.*

59. It is certainly possible, however, that only asking which sample is more persuasive may be too general a question. Still, for the reasons above, I thought it better to ask that question rather than any alternative.

60. *See supra* nn. 27–40 and accompanying text (arguing that asking judges to choose between two cohesive pleadings is a better indicator of persuasiveness than asking them to

ing as much as possible by giving the judges excerpts of potential court filings. I also wanted the surveys to be large enough so that the results would not be criticized for being too reliant upon one group of judges[61] or one geographic area (unlike the Benson and Kessler survey, which only surveyed ten judges in a California appellate court).[62]

More than all this, though, I wanted to be more comprehensive both in the number and variety of respondents, the kinds of writing I sent them, and the data I collected. The 800 judges were asked about their age, years of judicial experience, years of legal experience, gender, and whether they sit in a rural or urban district. I also compared the data between state and federal judges and between trial and appellate judges.

Most importantly, though, I wanted to test the limits of what was generally acceptable: I wanted one of the writing samples to be as conversational as possible—I wanted to use contractions and begin sentences with conjunctions, and I wanted to use the most informal language I could without slipping into slang.

B. Survey Recipients

I picked the survey recipients by using a simple random sample.[63] Using the databases of judges on Leadership Library Online,[64] I created computer-generated simple random samples to compile the survey recipient lists for the federal judges (both trial and appellate) and the state appellate judges.[65] I could not find a

choose between two groups of text—either one sentence or only a few sentences in length—and indicating which they find more persuasive).

61. None of the sample sizes is large enough to be statistically significant with a ninety-five percent confidence interval and a five percent margin of error. Nonetheless, because all the cohorts show about the same preference rate, we can infer that a randomly selected group of judges would indicate their preferences at about the same rate as the judges in this study did.

62. *See supra* nn. 41–52 and accompanying text.

63. To ensure that the group of judges that received surveys was a fair cross-section of the judge population, I used a simple random sample. A simple random sample ensures that every judge had an equal chance in receiving a survey and, thus, reduces bias. *See e.g.* David S. Moore, *The Basic Practice of Statistics* 170–171 (2d ed., W. H. Freeman & Co. 2000).

64. *Leadership Library Online*, http://www.leadershipdirectories.com/ (accessed Jan. 15, 2006).

65. The population of federal appellate judges was 293 (combining both civil and bankruptcy judges), with 1544 federal trial judges (combining district court judges, magistrate judges, and bankruptcy judges), and 989 state appellate judges.

database of state trial judges, so I had to compile that sample myself. I used a random number-table and a judicial directory[66] to choose the state trial judges.[67]

Because I chose the recipients by a simple random sample, the samples of judges from the various cohorts represent a fair cross-section of the population of judges.[68] No geographic area was preferred—the survey reached judges in all fifty states. Seniority or status was not a factor either. Nor was gender, race, ethnicity, or age.

As with any statistical study calling for a voluntary response, the data are limited to those who responded to the survey.[69] But there is no reason to believe that those who responded to the survey have significant differences in preference to those that did not respond.

C. The Writing Samples

Three different writing samples were distributed—a Legalese piece,[70] a Plain English piece,[71] and a piece that takes Plain English to an extreme—a piece I call the "Informal" piece.[72] To ensure that the samples' subject matter did not influence the results, all three samples made the same argument regarding a boring procedural subject matter—a response to a request for stay in a bankruptcy proceeding.

1. Legalese Sample Versus the Plain English Sample

The Legalese sample is an excerpt from an original court filing.[73] The writing samples use the same argument and cite to the same cases. They differ in the following ways:

66. Catherine A. Kitchell, *BNA's Directory of State and Federal Courts, Judges, and Clerks: A State-by-State and Federal Listing* (2006 ed., Bureau Natl. Affairs 2005).

67. The population of state trial judges was 9,929. (This figure was produced by adding together the number of judges in every state including the District of Columbia and Puerto Rico. An e-mail is on file with the Author for a more detailed breakdown.)

68. *See* Moore, *supra* n. 63, at 170–171.

69. *See id.* at 169 (discussing "a voluntary response sample, 'which consists of people who choose themselves by responding to a general appeal'").

70. *See* app. 1.

71. *See* app. 2.

72. *See* app. 3.

73. The names were changed and a few substantive changes were made.

1. **Title.** The title in both the Legalese and the Plain English samples are unnecessarily long but traditional. The only difference I made to the Plain English version was to rearrange the wording. Instead of "Response of X to Y", I wrote "X's response to Y's . . . ".

2. **Opening.** The Legalese sample begins with a traditional "COMES NOW" opening paragraph. It contains Legalese such as the capitalized "COMES NOW" and the couplet "by and through." Plain English proponents suggest deleting this opening paragraph entirely.[74] I considered deleting it, but I thought doing so was too drastic of a change for the motion's opening. I was concerned that some survey respondents would make their decisions based upon the existence or non-existence of the opening. There were too many variables that I thought were more subtle in the Plain English version, and I wanted to test them as well. I retained the opening but made it more concise and deleted the legalese "COMES NOW" and "by and through" language.

3. **Headings.** The Legalese sample uses headings for organizational purposes. But the headings are both underlined and are in all capital letters. The Plain English version does not use the underlining and takes away the all-caps format.

4. **Unnecessary words.** Many of the sentences in the Legalese argument sections use unnecessary words and phrases. The Plain English version deletes them. It also deletes an entire paragraph.

5. **Use of lists.** The Legalese version tells the court that there are four reasons why the court should deny the motion for stay. In doing so, the Legalese version embeds a list within a textual sentence.

74. *See e.g.* Beverly Ray Burlingame, *On Beginning a Court Paper*, 6 Scribes J. Leg. Writing 160, 160–163 (1996–1997) (reprinted in 82 Mich. B.J. 42, 42–43 (Nov. 2003)).

The Plain English version retains the important four-element test, but it uses a tabulated list.

6. **Passive versus active voice**. The Legalese version uses the passive voice more than the Plain English version.[75] (Still, though, the Legalese version is not primarily written in passive voice.[76])

7. **Multiple thoughts in the same sentence.** The Legalese sample has more sentences that contain multiple ideas.

8. **Topic sentences.** The topic sentences in the Plain English version do a better job of laying out the paragraphs' purposes.

9. **Overall conciseness and clarity.** The Plain English version seeks to convey ideas using fewer words than the Legalese version uses. For example, the Plain English version uses the phrase "the court's decision" instead of "the decision of the court." Additionally, the organization of the Plain English sample eliminates multiple sentences by rewording others.

10. **Sentence length.** The Plain English sample uses shorter sentences than the Legalese sample uses. The average sentence length in the Plain English sample is 17.8 words; the average sentence length in the Legalese sample is 25.2 words.

2. Informal Sample Versus Legalese Sample

Joseph Kimble states in *The Elements of Plain Language* that the writer should "[r]esist the urge to sound formal"; the writer should "[r]elax and be natural (but not too informal)."[77] I wanted to know if informal writing was, indeed, unpersuasive. The changes I made to the Plain English version made the argument

75. Microsoft Word breaks it down to 6 percent for the Plain English and 8 percent for the Legalese.

76. Passive voice only occurs at an 8 percent rate.

77. *See* Kimble, *supra* n. 6, at 44.

simpler and deleted some of the traditional style and tone, but I wanted the Informal sample to go a little further. The Informal sample is different from the Plain English sample in the following ways:

1. **Title.** The Informal version is extremely succinct in its title. Instead of a standard title in bold all-caps, such as the Plain English's "TSC OPERATING LIMITED PARTNERSHIP AND LITTUS, LLC'S RESPONSE TO HENRY H. HINEMAN'S MOTION FOR STAY PENDING APPEAL," the Informal version titles the document, "Plaintiffs' Response to Defendant's Motion for Stay Pending Appeal."

2. **Opening.** The Informal version deletes the opening altogether and begins with an introduction.

3. **Contractions.** The Informal sample uses contractions, including six in the introduction alone.

4. **But.** On two occasions, the Informal sample uses the conjunction "but" to begin a sentence.[78]

5. **First person.** In the Informal sample's introduction, the author uses the first person. The author states the four criteria for granting a stay and writes, "My analysis addresses [all four issues]."[79]

6. **Conversational in tone.** When I wrote the Informal sample, the idea in my mind was to be as conversational as possible. In addition to the abundant use of contractions and the use of "but" to start two sentences, the informal document also uses "What's more" as an introductory phrase instead of a more formal "furthermore" or "additionally."

7. **Sentence length.** The Informal sample has an average sentence length of 16.3 words compared to

78. *See* Bryan A. Garner, *On Beginning Sentences with But*, 82 Mich. B.J. 43 (Oct. 2003) (encouraging the use of the conjunction "but" to begin a sentence).

79. *See* app. 3.

17.8 in the Plain English sample and 25.2 in the Legalese sample.

3. What the Judges Saw

The Legalese sample is 3¼ pages long, the Plain English is 2½ pages, and the Informal is 2 pages long.[80] I was concerned that if I sent three writing samples to every potential respondent, the response rate would be low because judges would not have the time to read all three samples; I was already asking a lot of the judges by giving them six or seven pages of text. So within each cohort of 200 survey recipients, 100 received the Legalese and the Plain English samples and 100 received the Legalese and the Informal samples.

The order in which respondents view stimuli can influence their preferences.[81] To ensure against any bias, therefore, half of each sub-cohort of 100 saw the two samples in one order while the other half of the sub-cohort saw the samples in the reverse order. (Of course, I named those samples differently depending on which order they appeared.[82])

Each cohort of 200 samples was divided in the following way:

- Fifty saw the Plain English (marked "Sample X") followed by the Legalese (marked "Sample Y");
- Fifty saw the Legalese (marked "Sample A") followed by the Plain English (marked "Sample B");
- Fifty saw the Legalese (marked "Sample 1") followed by the Informal (marked "Sample 2"); and
- Fifty saw the Informal (marked "Sample 3") followed by the Legalese (marked "Sample 4").

D. The Survey

Each of the 800 recipients received two writing samples (either a Legalese sample and a Plain English sample or a Legalese

80. *See* apps. 1–3.

81. Robert B. Cialdini, *Influence: Science and Practice* 12–16 (5th ed., Pearson 2009).

82. Otherwise, the survey recipient might rearrange the papers and put them in the correct order or just assume a document labeled "1" should be read before document "2."

sample and an Informal sample); a cover letter;[83] a questionnaire; and a self-addressed, stamped envelope. The cover letter stated that I was doing research on legal writing and that I hoped to have the results published. Nowhere did I use the words "Plain English" or "Legalese."

Each judge received a brief one-page questionnaire.[84] The most important question on the survey was which of the two writing samples the judge found most persuasive.[85] But I also wanted to know whether a judge's preference for Plain English was in any way correlated with age, years of judicial experience, or years of experience in the legal profession. And I wanted to learn whether federal or state judges differed in their preferences or whether appellate or trial judges did. Lastly, I wanted to know if a judge's gender was correlated with a Plain English preference[86] or whether judges in rural or urban districts differed in what persuaded them.[87]

I also left room on the questionnaire for judges to make comments if they wished.

IV. THE RESULTS

A. The Response Rate

Of the 800 judges, 292 completed and returned the surveys, for a response rate of 37 percent. Figure 4.1 shows the response rate for each cohort of 200 judges.

Figure 4.1: Response Rate for Each Cohort of Judges

Cohort	Number of Responses	Response Rate
Federal Trial Judges	79	40%

83. *See* app. 6.

84. *See* apps. 4, 5.

85. *See supra* Sec. III(A) (discussing why asking the judges which sample is more persuasive is better than asking a series of questions).

86. Some respondents appeared offended that I would even ask their gender—several refused to answer; a few asserted something to the effect that "it doesn't matter."

87. I did not ask the appellate judges this question because appellate judges cover a larger jurisdiction that is almost always a combination of rural and urban areas; thus, asking appellate judges this question would provide little help in determining whether urban judges find Plain English more persuasive than rural judges do, or vice versa.

Federal Appellate Judges	59	30%
State Trial Judges	77	39%
State Appellate Judges	77	39%

The study revealed that judges prefer Plain English to traditional Legalese 66 percent to 34 percent. Moreover, each cohort of judges preferred Plain English to Legalese. Whether a judge practiced in a rural or urban area had no correlation with whether judges preferred Plain English. State and federal judges preferred Plain English at about the same rate, and so did trial and appellate judges. A judge's age, years of experience as a judge, years of experience in the legal profession, or gender was not correlated with whether a judge preferred Plain English or Legalese.

Moreover, judges also preferred the Informal sample—sprinkled with contractions and a conversational tone—to Legalese. Each cohort but one preferred the Informal sample to Legalese though by a narrower margin than they preferred the Plain English sample. Both state and federal judges preferred the Informal sample at about the same rate, but appellate judges were 23 percent more likely to prefer the Informal sample than trial judges were. Female judges overwhelmingly preferred the Informal sample: they preferred it 83 percent of the time. Rural trial judges, however, were the only group in the entire survey to prefer Legalese more than another writing style. Judges who preferred the Informal style were slightly younger and had slightly fewer years of experience both on the bench and in the legal profession.

B. Plain English Versus Legalese

The data show that judges prefer Plain English to Legalese; all four cohorts of judges preferred Plain English.[88] I sent 400 Plain English/Legalese[89] surveys to judges across the country; 153 judges returned them, for a response rate of 38 percent. Of the judges who stated a preference between the Plain English and

88. *See* fig. 4.3.

89. "Plain English/Legalese" means that the survey recipients received one writing sample in Plain English and one sample in Legalese; "Informal/Legalese" means that the recipients received one Informal sample and one Legalese sample.

Legalese writing samples, 66 percent preferred the Plain English style.[90] The preference was greatest for federal appellate judges, while federal trial judges favored Plain English just slightly more than they preferred Legalese.

90. One-hundred fifty-three judges returned Legalese/Plain English surveys. Four of those judges did not state a preference. Therefore, I based my analysis on the 149 surveys that stated a preference. *See* fig. 4.2.

Figure 4.2: Percent of Survey Respondents Preferring Plain English over Legalese

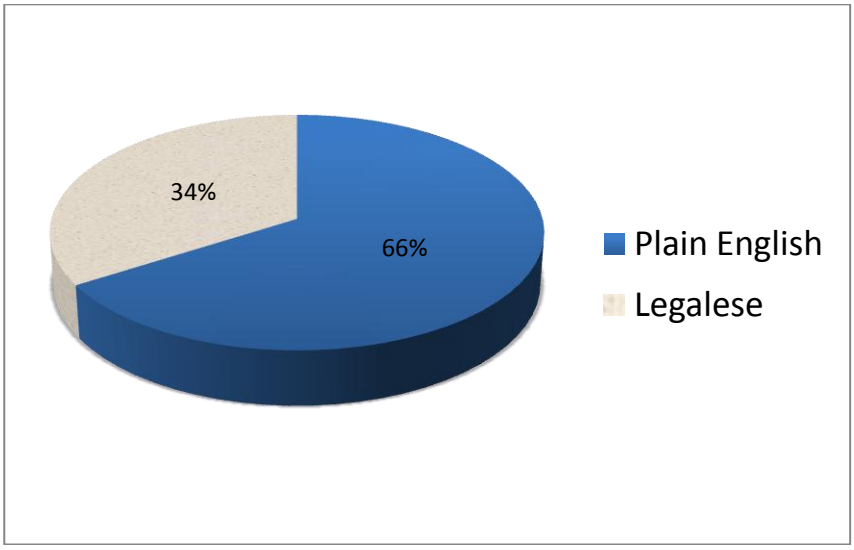


Figure 4.3: Preference by Cohort

Cohort	Plain English Preference Rate	Legalese Preference Rate
Federal Trial	52%	48%
Federal Appellate	73%	27%
State Trial	72%	28%
State Appellate	65%	35%

The data shows that both appellate and trial judges prefer Plain English at nearly the same rate; state and federal judges prefer Plain English at nearly the same rate as well. Appellate judges preferred Plain English 68 percent of the time while the trial judges preferred Plain English at a rate of 63 percent (see figure 4.4). State court judges preferred Plain English 68 percent of the time while federal judges preferred it at a rate of 62 percent (see figure 4.5).

Figure 4.4: Appellate v. Trial Judges

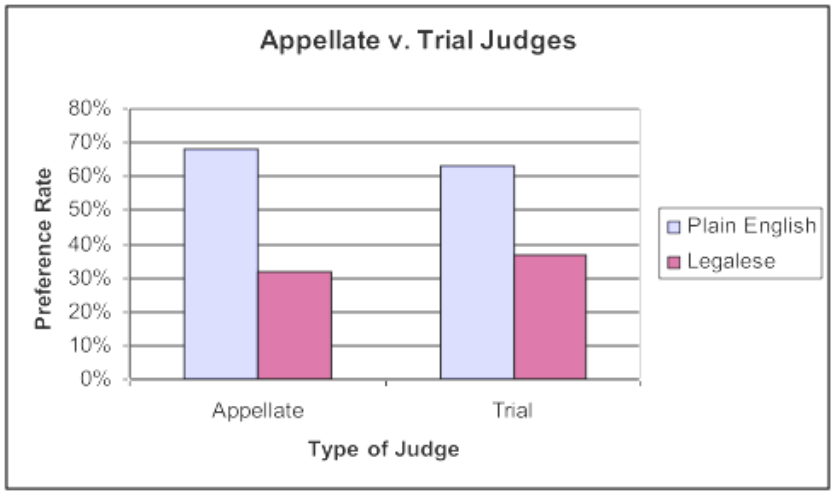
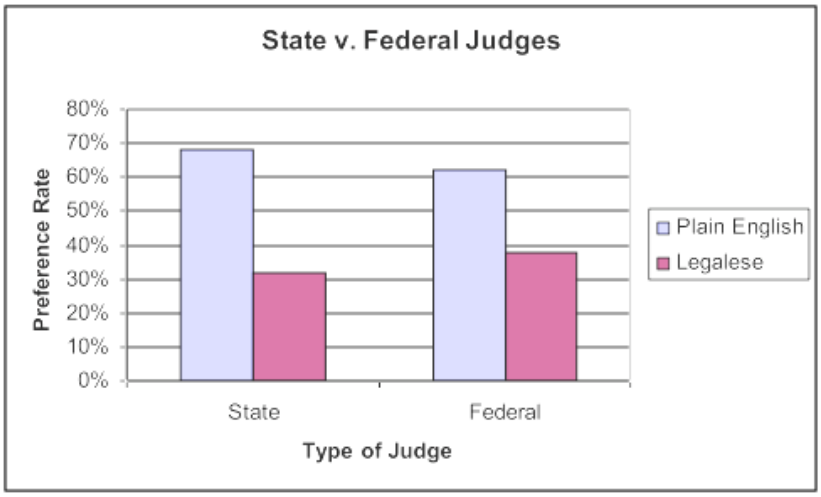


Figure 4.5: State v. Federal Judges



Further, the judge's age, years of judicial experience, or years of legal experience played no role in whether a judge preferred Plain English or Legalese. Respondents ranged in age from 27 to 86, ranged in judicial experience from less than a year on the bench to over 41 years, and ranged in legal experience from 1 year to 58 years. Figure 4.6 shows that the judges who preferred Plain

English were approximately the same age and had the same number of years of experience as judges who preferred Legalese.

Figure 4.6: Age and Experience

Style Preferred	Median Age	Median Years in Legal Profession	Median Years as a Judge
Plain English	58	31	15
Legalese	56	30.5	15

Similarly, gender is not correlated with whether judges prefer Plain English to Legalese. One-hundred forty-five respondents who received the Plain English/Legalese surveys both stated a preference and stated their gender (109 men and 36 women). Of those who preferred Plain English, 77 percent were male and 23 percent were female. Of those who preferred the Legalese, 75 percent were male and 25 percent were female. Males preferred the Plain English only slightly more than their female counterparts: males preferred the Plain English at a rate of 67 percent while females preferred it at a rate of 61 percent.

Whether a trial judge's district is rural or urban has little bearing on whether the judge will prefer Plain English or Legalese; both rural and urban judges prefer Plain English.[91] Of the 62 judges who stated a preference and stated whether their district is rural or urban, 40 classified themselves in urban districts while 22 classified their districts as rural. Rural judges preferred the Plain English at a 73 percent rate while the urban judges preferred the Plain English at a 63 percent rate.

In short, the data conclusively show that judges prefer Plain English to Legalese. All four cohorts preferred Plain English. The judge's age, number of years spent in the judiciary, number of years spent in the legal profession, and gender had no correlation with whether the judge preferred Plain English or Legalese. Further, whether the trial judge was from a rural or urban district did not matter. Even more telling than the empirical data, though, are some of the comments that judges wrote on their surveys.

91. As discussed in Section II(D), *supra*, I did not ask appellate judges if they sit in rural or urban areas.

Several judges commented that the Plain English sample was more persuasive because of the succinctness of the argument. One state appellate judge wrote, "[The Plain English version] is easier to understand, more clear and straightforward, [and] therefore, more persuasive." Another judge commented that the Plain English version is "simpler, more direct prose. Getting to the point trumps pontificating any day." Another judge wrote, "[The Plain English sample] is easy reading. It goes directly to the point." A few judges commented on the brevity of the Plain English samples, and several commented on the use of the lists and the deletion of the opening paragraph's gobbledygook language as contributing to their preference for the Plain English sample. The general theme of the comments was that the judges found the Plain English sample to be "cleaner, leaner, and more effective and understandable."

A few judges commented that legal writing does not demand that the author "sound like a lawyer." A state trial judge from Georgia wrote, "Thinking and writing like a lawyer does not require arcane, stilted language. [The Legalese sample] is typical diction. [The Plain English sample] does the highlighting with form." Another judge wrote, "My first impression on [the Legalese sample] was negative with the first word. . . . After that . . . it read like someone trying to 'sound' like an attorney. The convoluted style led me to skimming for its essence." This was not the only judge who stated that the writing style in the Legalese sample inspired him to pay little attention to the document's logical intricacies. These comments make clear that an indirect and convoluted writing style is likely to make the document go unread. An unread document cannot be persuasive.

Some judges, however, preferred the Legalese. One stated that while she appreciated the brevity of the Plain English version, she characterized the Legalese as "more polished." And another indicated that he preferred the "formal" writing in the Legalese. One judge even wrote that the Legalese was "easier to read." But these comments were in the minority.

While the vast majority preferred the Plain English version and some noted that the decision was "obvious," a handful of judges wanted more. They commented that both the Plain English and Legalese samples were "too wordy." One judge seemed angered by the samples; he graded them both with a large "F" and berated me for sending him such poor writing. Another judge

noted that both samples were "too verbose and filled with [formal] 'legalese.'"[92] Other judges wrote that the samples were "not punchy enough" and that both could be "more succinct."

But could a litigator take this advice too far? Put another way, in the Legalese-Plain English continuum, is it possible to be too informal? I attempt to answer this question in the next section.

C. Informal Versus Legalese

The conventional wisdom is that legal writing must be formal—that judges do not want informality in their courtrooms or in pleadings.[93] The Plain English movement is moving legal writing from a stilted, formalistic style to one that is more direct and "plain." This Article will hopefully continue to shift legal writing in that direction. But can this shift from formality to informality go too far? The data show that judges—as a group—would much rather have an attorney err on the side of informality than err on the side of being too stilted and formal.

Judges would rather read informal (yet direct and to the point) pleadings than Legalese. Of the 400 Informal/Legalese surveys I sent, 139 judges returned completed surveys, for a response rate of 35 percent. Of those 139 judges, 58 percent stated a preference for the Informal sample over the Legalese.[94] Moreover, nearly every cohort preferred the Informal sample (though not to the extent that they preferred Plain English to Legalese).[95]

92. A fair criticism of this Plain English sample is that it does not go far enough in incorporating Plain English and, as this judge pointed out, remains "too wordy." *See* Burlingame, *supra* n. 74, at 42.

93. Kimble, *supra* n. 6, at 27.

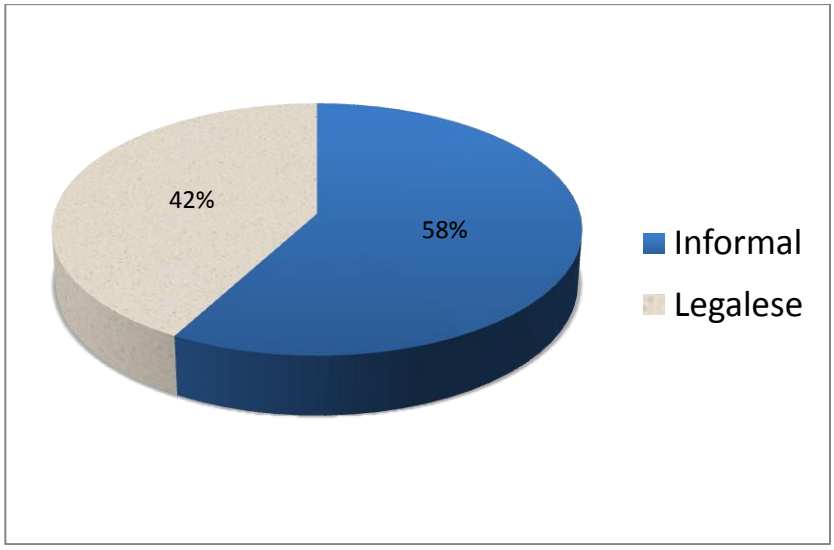
94. *See* fig. 4.8.

95. *See* figs. 4.2, 4.7.

Figure 4.7: Preference by Cohort

Cohort	Informal Preference Rate	Legalese Preference Rate
Federal Trial Judges	53%	47%
Federal Appellate Judges	58%	42%
State Trial Judges	53%	47%
State Appellate Judges	69%	31%

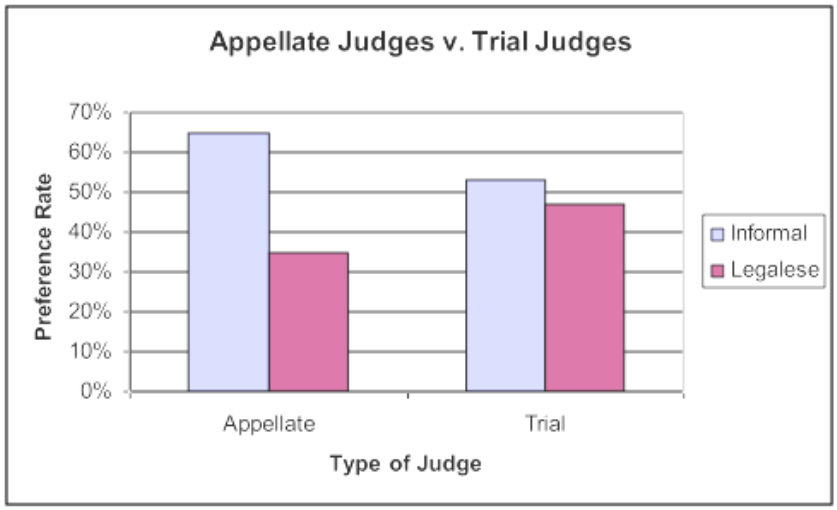
Figure 4.8: Percent of Survey Respondents Preferring the Informal Sample over the Legalese



Appellate judges preferred the Informal sample by a substantially wider margin than trial judges did. Appellate judges preferred the Informal sample by a margin of 64 percent to 35 percent; trial judges preferred the Informal writing style at a much lower rate—they preferred it 53 percent to 47 percent.[96] Appellate judges were, therefore, 23 percent more likely to prefer the Informal sample than trial judges were.

Figure 4.9: Appellate Judges v. Trial Judges

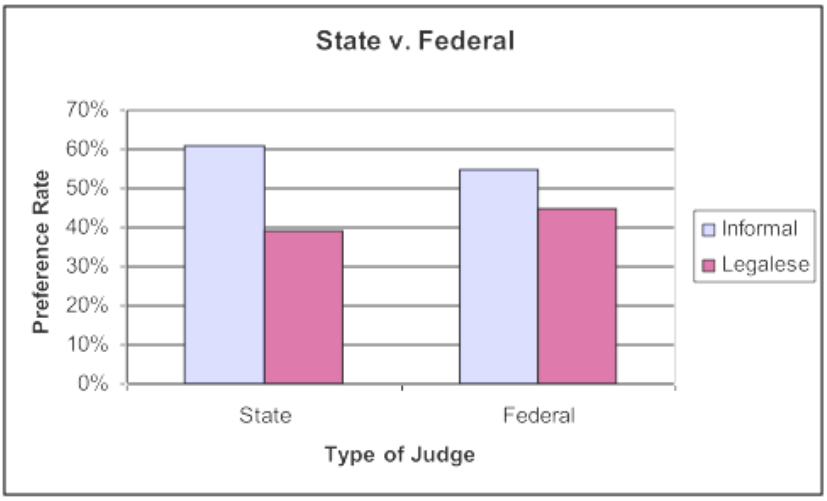
96. *See* fig. 4.9.



State and federal judges preferred the Informal sample at nearly the same rate. Of the 139 judges who returned an Informal/Legalese survey, 70 were state judges and 69 were federal judges. State judges preferred the Informal sample 61 percent of the time while federal judges preferred it at a rate of 55 percent.[97]

97. *See* fig. 4.10.

Figure 4.10: State v. Federal Judges

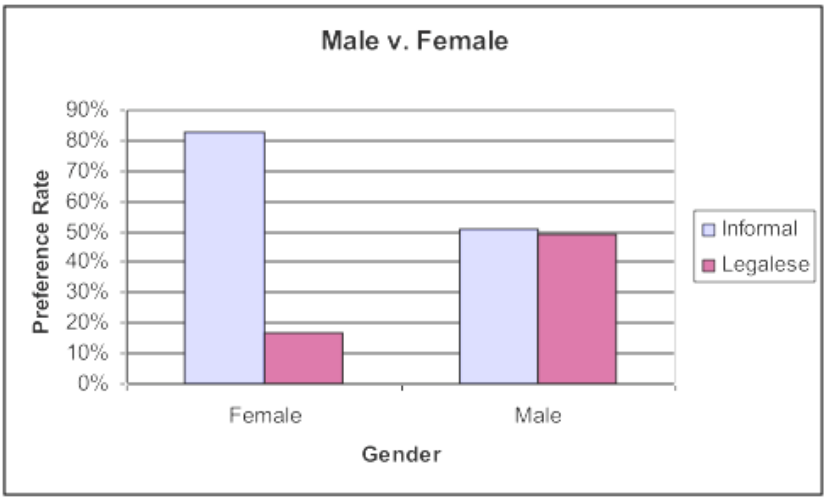


Female judges are much more likely to be persuaded by an informal pleading than male judges are. Of the 138[98] judges who both received the Informal and Legalese samples and stated their gender, 29 were women, and 109 were men. Female judges preferred the Informal sample by a rate of 83 percent while the males only preferred it 51 percent of the time. Only 9 percent of the judges who preferred the Legalese were female while 30 percent of the judges who preferred the Informal were female. This finding is consistent with a prior study that indicated women tend to write more informally than men do—it follows that they would be open to be persuaded by informal writing as well.[99]

98. *See* fig. 4.11.

99. *See* Shlomo Argamon et al., *Gender, Genre, and Writing Style in Formal Written Texts*, 23 Text 321, 332–333 (2003) (stating that the results of an empirical study show that women tend to use the first person and contractions at a higher rate than men in formal written texts).

Figure 4.11: Gender Breakdown



While age, years of judicial experience, and years of experience in the legal profession had no relationship with whether a judge preferred Plain English to Legalese,[100] those factors were slightly correlated with whether a judge preferred the Informal sample to the Legalese.[101] The 139 respondents ranged in age from 42 to 86; in years on the bench, they ranged from less than 1 year to over 40 years; in years of experience in the legal profession, they ranged from 15 years to 53 years. The median in all three categories was slightly lower for the Informal respondents than it was for the Legalese respondents.

Figure 4.12: Age and Experience

Style Preferred	Median Age	Median Years in Legal Profession	Median Years as a Judge
Informal	59	32	13
Legalese	60	34.5	17

100. *See supra* fig. 4.6; *supra* sec. IV(B).
101. *See* fig. 4.12.

While urban trial judges preferred the Informal sample by a 59 percent margin, rural trial judges preferred the Legalese sample at a rate of 55 percent. Rural trial judges were the only category of judges who preferred the Legalese sample to the Informal sample.[102]

Just as the judges' comments in Part IV(B) helped to explain the judges' preferences for Plain English over Legalese, the judges' comments regarding their preference for the Informal sample are telling as well. A few judges commented that the choice was not "even close," and that they preferred the Informal sample by a wide margin. Several judges who preferred the Informal sample indicated that they liked the use of lists, active voice, simple sentence structure, the direct language, and the brevity and succinct language in the Informal sample. One state trial judge wrote, "Short and direct is almost always more persuasive."

Additionally, several judges applauded the elimination of the introductory paragraph that traditionally contains the phrase "Comes Now," identifies the parties, and states that the party submitting the motion "will show as follows." One such judge noted that he recently gave a presentation to his former law firm on effective writing and entitled his accompanying presentation, "Comes Now the Idiot," in the hopes that the lawyers would stop inserting the useless language into pleadings. These "Comes Now" paragraphs usually identify the parties by stating "Defendant Hineman," "Plaintiff TSC Operating, Inc.," etc. Observing that the plaintiffs and defendants are identified in the caption on every pleading's first page, one apparently frustrated appellate judge wrote, "Who else would Hineman be?" after crossing out the paragraph with this language. Indeed, his point is well-taken. While one could imagine a scenario where this paragraph might offer some utility, it is useless in the vast majority of instances. Following the same logic behind the elimination of this "Comes Now" paragraph, I would guess that the "To the Honorable Court" language that is also prevalent would yield the same response

102. Only 20 of the 139 judges declared that they sat in rural districts. Eleven of the judges preferred the Legalese while nine preferred the Informal. Thus, a two-person swing could have changed the result. Further study is necessary to determine how reliable this result is.

had I included it in this survey. To paraphrase one appellate judge, "Who else would the pleading be submitted to?"

Still, despite the high marks the Informal sample received, the Informal sample drew heavy criticism for its use of contractions. Several judges who preferred the Informal sample commented that the use of contractions was too much. One judge wrote, "I found [the Informal sample] more persuasive than [the Legalese]. It is more didactic and somewhat easier to read. But its use of contractions and colloquial terms weakens the presentation." Several judges who preferred the Legalese stated that even though they liked the informality and directness of the Informal sample, it went too far. One judge wrote, "Although [the Informal sample] is very 'readable'—and I am not a slave to formality or stilted prose—[the Informal sample] is too loose, too informal, and too casual—excessive contractions (if any) have no place in formal pleadings, briefs, etc. Simple and direct is good, but there [is a limit]." Another judge wrote, "I like the more informal style of [the Informal sample] but it goes too far. I don't like contractions and the tone distracts from the seriousness of the matter." One judge wrote, "Some use of contractions is fine [but] this is too much." Others found that the use of contractions was not "polite." A couple of judges referred to the use of contractions as "slang."

However, despite several judges' hesitation to use the informal style, most judges preferred the conversational style and tone of the Informal sample. One federal appellate judge wrote, "[The Informal sample] may be a bit too informal, but as compared with the stilted tone of [the Legalese sample], it is certainly preferable."

V. CONCLUSION

The results are clear: judges prefer Plain English to Legalese. Whether a judge is an appellate or trial judge or a federal or state judge plays no role in whether the judge prefers Plain English. Nor does the judge's gender, age, years of judicial experience, or years of experience in the legal profession. Whether a judge's district is rural or urban plays no role, either. Judges—by a two-thirds margin—find Plain English more persuasive than Legalese. Thus, it is in the litigator's interest to submit pleadings in Plain English.

Judges prefer the Plain English style so much that they would rather have litigants submit informal pleadings, filled with contractions and first person, than formal Legalese.[103] Thus, when making a writing-style decision, it is probably better to err on the side of informality and clarity than formal Legalese. Still—as the data indicate—pleadings should not be too informal. The lawyerly instinct, therefore, to use all-caps, "COMES NOW"-type language, for example, and all the other legalese common in pleadings should be avoided. There is simply no reason to think that "judges want it" or "that's the way it should be done." It is not the way judges want it.

103. More judges preferred the Informal sample than the Legalese sample. *See supra* Sec. IV(C).

APPENDIX 1: LEGALESE SAMPLE[104]

(caption omitted)

RESPONSE OF TSC OPERATING LIMITED PARTNERSHIP AND LITTUS, LLC TO MOTION OF HENRY H. HINEMAN FOR STAY PENDING APPEAL

COMES NOW the Plaintiffs, TSC Operating Limited Partnership (hereinafter "TSC") and Littus LLC ("Littus"), by and through their attorneys of record and file this, TSC and Littus's Response of TSC Operating Limited Partnership and Littus, LLC to Motion of Henry H. Hineman for Stay Pending Appeal and would respectfully show unto the court as follows:

INTRODUCTION

Defendant Hineman is attempting to stay the force and effect of the remand orders entered by this court on February 25, 2004 (hereinafter the "Remand Orders") under Federal Rule of Bankruptcy Procedure 8005 governing stays pending appeal because he believes that he will likely succeed on appeal to the District Court. Hineman, unlikely to prevail on appeal, cannot meet Rule 8005's threshold inquiry which is a "strong showing" of the likelihood of success, and is, thus, incorrect in his analysis under Rule 8005. Furthermore, Hineman cannot make appropriate showings on the other three inquiries under the Rule: whether appellant will suffer irreparable injury absent a stay; whether a stay would substantially harm other parties in the litigation; and whether a stay is in the public interest. Hineman fails on all counts, and the request for stay must be denied.

ANALYSIS

Under Federal Rule of Bankruptcy Procedure 8005, the court should consider (1) the likelihood of success on the appeal, (2) whether the appellant will suffer irreparable harm absent a stay, (3) whether a stay would harm other parties to the litigation, and (4) whether a stay would harm the public interest. *In re Forty-Eight Insulations*, *Inc.* 115 F.3d 1294, 1300 (7th Cir. 1997). The decision of a court to deny a Rule 8005 stay is highly discretionary, and the likelihood of success is the threshold inquiry in this analysis, which Hineman must meet. *In re 203 North LaSalle Street Partnership*, 190 B.R. 595, 596 (N.D. Ill. 1995);

104. Respondents did not see this label.

Forty-Eight Insulations v. Smith, 115 F.3d 1301, 1304 (N.D. Ill 2000). If the threshold burden is not met, the court should not consider the other stay factors. Forty-Eight Insulations, 115 F.3d at 1304.

A. It Is Unlikely That Hineman Will Succeed on the Merits.

Hineman's Notice of Appeal asks the District Court to overturn the Remand Orders. Hineman erroneously applies the preliminary injunction definition of "likelihood of success" and argues that the "likelihood of success" showing only requires him to show that his chances of success on appeal are "better than negligible" instead of the standard required by Rule 8005. (Hineman Motion at 4.) In the context of a stay pending appeal, where the arguments of the movant have already been evaluated on a success scale, the applicant must make a stronger threshold showing of the likelihood of success to meet his burden. *In re Forty-Eight Insulations, Inc.*, 115 F.3d at 1300. While Hineman cites the *Forty-Eight Insulations* case, which supplies the "stronger showing" threshold that Hineman must make, he ignores its standard, instead citing a string of preliminary injunction cases that do not apply to the case at bar.

Moreover, the likelihood of success standard on a stay motion pending appeal requires the movant to demonstrate a "substantial showing" of the likelihood of success, "not merely the possibility of success." *Id.* at 1295, citing *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (concluding that a stay movant must raise "serious questions going to the merits"). This is because he must convince the reviewing court that the lower court, after having the benefit of evaluating the relevant evidence, has likely committed reversible error. *Forty-Eight Insulations at 1295*. See also, *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973) (requiring a stay movant to make a "strong" and "substantial" showing of likelihood of success before a reviewing court should intrude on the ordinary process of judicial administration); *In re Beswick*, 98 B.R. 905, 906 (N.D. Ill. 1989) (denying a Rule 8005 Motion where movant's main argument was that certain other alternatives should have been explored by the court).

Additionally, Hineman's analysis on likelihood of success addresses only the jurisdictional issue. Hineman believes that he can better argue "related to" jurisdiction now that the Maryland Bankruptcy Court has entered the Dismissal Order and reinstated the 2003 Cases. The issues relating to the Maryland Bankruptcy were briefed by the parties, and the judge informed the parties that he had read and considered all the papers, that the parties' filings were very good, and that counsel had done an excellent job. (2/19/04 Tr. At 2, 26.) Hineman's showing on the likelihood of success in the jurisdictional issue does not rise to the "strong showing" required by the Seventh Circuit.

Also, Hineman does not offer any analysis in his "likelihood of success" consideration as to how he will overcome the late filing of the removal papers. Therefore, on its face, Hineman's likelihood of success analysis in the removal papers issue fails, and no stay should issue.

APPENDIX 2: PLAIN ENGLISH SAMPLE[105]

(caption omitted)

TSC OPERATING LIMITED PARTNERSHIP AND LITTUS, LLC'S RESPONSE TO HENRY H. HINEMAN'S MOTION FOR STAY PENDING APPEAL

Plaintiffs, TSC Operating Limited Partnership ("TSC") and Littus LLC ("Littus"), by their attorneys, Greg West, Joseph Rhound and Danika Wells, state as follows in response to Defendant Henry H. Hineman's ("Hineman") motion for stay pending appeal:

INTRODUCTION

This is a response to Defendant Hineman's motion for stay pending appeal. Hineman seeks to stay the effect of the remand orders this court entered on February 25, 2004. Hineman is incorrect, however, in his analysis under Rule 8005 and he is unlikely to prevail on appeal for four reasons:

1. He has not met and cannot meet the "strong showing" of likely success threshold required under Rule 8005;

2. He cannot show that he will suffer irreparable injury absent a stay;

3. A stay could substantially harm other parties in the litigation; and

4. He cannot show that stay is in the public interest.

A court's decision to deny a Rule 8005 stay is discretionary. *In re 203 North LaSalle Street Partnership*, 190 B.R. 595, 596 (N.D. Ill. 1995). The first item, the likelihood of success, is a threshold inquiry, and if the threshold burden is not met, the court should not consider the other stay factors. *Forty-Eight Insulations v. Smith*, 115 F.3d 1301, 1304 (N.D. Ill 2000). This analysis addresses the threshold burden as well as the other three factors.

A. It is unlikely that Hineman will succeed on the merits.

Hineman's Notice of Appeal misinterprets the law. Hineman argues that the "likelihood of success" showing only requires him to show that his chances of success on appeal are "better than negligible." (Hineman Motion at 4.) The "better than negligible" standard, however, is the standard for a preliminary injunction—not for a stay. A Rule

105. Respondents did not see this label.

8005 "likelihood of success" standard is a much greater burden to meet. In *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973), the reviewing court required a stay movant to make a "strong" and "substantial" showing of likelihood of success before it would intrude on the ordinary process of judicial administration. The court requires this greater burden because the movant must convince the reviewing court that the lower court, after evaluating the relevant evidence, likely committed reversible error. *Forty-Eight Insulations at 1295*. *In In re Beswick*, 98 B.R. 905, 906 (N.D. Ill. 1989), the court denied a Rule 8005 Motion in which the movant's main argument was that the court should have explored other alternatives.

Further, Hineman's argument fails because his analysis only addresses one of the two issues in this case; his analysis of the issue he does address is not persuasive. Hineman's Notice of Appeal only addresses the jurisdictional issue—he does not address how he will overcome the late filing of the removal papers. Hineman believes that he can better argue "related to" jurisdiction now that the Maryland Bankruptcy Court has entered the Dismissal Order and reinstated the 2003 cases. The issues relating to the Maryland Bankruptcy were briefed by the parties, and the judge informed the parties that he had read and considered all the papers, that the parties' filings were very good, and that counsel had done an excellent job. (2/19/04 Tr. At 2, 26.) Hineman relies on the court's compliments to argue that he has a "likelihood of success" on appeal. A court's compliments do not rise to the "strong showing" required by the Seventh Circuit.

APPENDIX 3: INFORMAL SAMPLE[106]

(caption omitted)

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR STAY PENDING APPEAL

INTRODUCTION

Hineman seeks to stay the effect of the remand orders this court entered on February 25, 2004. But Hineman is incorrect in his analysis under Rule 8005 and is unlikely to prevail on appeal for four reasons:

1. He hasn't met and can't meet the "strong showing" of likely success threshold required under Rule 8005;

2. He can't show that he will suffer irreparable injury absent a stay;

3. A stay could substantially harm other parties in the litigation; and

4. He can't show that stay is in the public interest.

A court's decision to deny a Rule 8005 stay is discretionary. *In re 203 North LaSalle Street Partnership*, 190 B.R. 595, 596 (N.D. Ill. 1995). The first item, the likelihood of success, is a threshold inquiry, and if Hineman doesn't meet the threshold burden, the court shouldn't consider the other stay factors. *Forty-Eight Insulations v. Smith*, 115 F.3d 1301, 1304 (N.D. Ill 2000). My analysis addresses the threshold burden as well as the other three factors.

A. It is unlikely that Hineman will succeed on the merits

Hineman's Notice of Appeal misinterprets the law. He argues that the "likelihood of success" showing requires him to show only that his chances of success on appeal are "better than negligible." (Hineman Motion at 4.) But the "better than negligible" standard is the standard for a preliminary injunction—not for a stay. A Rule 8005 "likelihood of success" standard is a much greater burden to meet. Courts require that stay movants make a "strong" and "substantial" showing of likelihood of success before granting a stay. *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973). Courts require this greater burden because the movant must convince the reviewing court that the lower court, after evaluating the relevant evidence, likely committed reversible error. Forty-Eight Insulations at 1295. For example, in *In re Beswick*, 98 B.R. 905, 906 (N.D. Ill. 1989), the court denied a Rule 8005 Motion in which

106. Respondents did not see this label.

the movant's main argument was that the court should have explored other alternatives.

What's more, Hineman's argument fails because his analysis addresses only one of the two issues in this case. And his analysis of the issue he does address is not persuasive. Hineman's Notice of Appeal addresses only the jurisdictional issue—he does not say how he will overcome the late filing of the removal papers. Hineman believes that he can better argue "related to" jurisdiction now that the Maryland Bankruptcy Court has entered the Dismissal Order and reinstated the 2003 cases. The issues relating to the Maryland Bankruptcy were briefed by the parties, and the judge told the parties that he had read and considered all the papers, that the parties' filings were very good, and that counsel had done an excellent job. (2/19/04 Tr. At 2, 26.) Hineman relies on the court's compliments to argue that he has a "likelihood of success" on appeal. But a court's compliments do not rise to the "strong showing" required by the Seventh Circuit.

APPENDIX 4

Survey

1. Which writing sample is more likely to persuade you? _____

2. Your age _____

3. Your gender _____

4. Years as a judge_____

5. Years in legal profession_____

6. Would you describe your district as rural or urban?_____

Comments (optional):

APPENDIX 5

Survey

1. Which writing sample is more likely to persuade you? _____

2. Your age _____

3. Your gender _____

4. Years as a judge_____

5. Years in legal profession_____

Comments (optional):

APPENDIX 6

November 4, 2005

Your Honor,

I am a member of the Texas Law Review at the University of Texas at Austin School of Law and I am conducting research on persuasive legal writing. It is my hope and expectation that the study's findings will result in publication. I am writing to kindly request your participation in a brief survey.

If you choose to participate, it will take no more than 5 minutes of your time. Your responses are anonymous.

Enclosed are a brief survey and two excerpts from potential court filings. Please read each sample and answer the questions on the Survey Sheet entitled, "Survey." When you are finished with the Survey, please use the self-addressed stamped envelope to mail your Survey by December 12th. You only need to mail the Survey; you can discard this letter and the writing samples.

Your participation in this survey is invaluable to the project's success and is greatly appreciated. You may direct any questions to me at flammer@mail.utexas.edu.

Thank you for your participation.

Sincerely yours,

Sean Flammer
Legal Writing Project
Texas Law Review
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