



Plain English and legal writing: Comparing expert and novice writers



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ABSTRACT

Language-focused materials for teaching professional legal writing to second language writers of English in U.S. law schools have been dominated by a set of “Plain English” recommendations, particularly avoidance of the passive voice and nominalizations. At the same time, little to no research has addressed whether these recommendations actually reflect expert use or whether they are indicative of more or less skilled novice performance. To investigate the use of these features in expert and learner texts, two corpora were examined. The expert corpus was composed of 10 published pedagogical sample memos used in legal writing instruction. The learner corpus was composed of 13 low-rated student memos and 13 high-rated student memos. Although an initial chi-square comparison of learner and expert corpora suggests that the experts use both the passive voice and nominalizations significantly less frequently than learners, further analysis suggests that the usage of these features does not clearly distinguish more skilled novices from those who are less skilled. A closer look at the expert corpus also suggests that the use of these features is highly variable across individual samples. Implications for pedagogy are discussed.

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1. Introduction

Law schools in the United States have seen a marked increase in international admissions in recent years. From 1998 to 2003, the number of programs available to foreign law graduates increased by 50% (Silver, 2006, p. 147) and the number of international students enrolled in such programs increased by 130% (Silver, 2006, p. 149). This was paralleled by a 54% increase in the number of foreign-educated lawyers sitting for the New York bar exam (Silver, 2006, p. 149). While some international students enter J.D.¹ programs, the majority of these international students enroll in LL.M.² or S.J.D.³ programs. The LL.M. program in this study was composed almost exclusively of international students and had increased its enrollment by almost 50% in the year in which the study was conducted. The program and others like it are expanding, and the demand for a legal writing curriculum capable of meeting the needs of L2 English students has increased accordingly.

Legal writing courses for L2 English students vary across LL.M. programs. Some of these, such as the course described in Feak and Reinhart (2002) and Reinhart and Feak (1997), emphasize academic legal writing, particularly the writing of law seminar papers. Other courses, such as the one involved in this study, focus on professional legal writing. In the United States, these professional legal writing courses often adopt the same curriculum used for first-year J.D. students. This

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¹ *Juris Doctor*, or Doctor of Jurisprudence. This is the degree required to practice law in most U.S. states.

² *Legum Magister*, or Master of Laws. All students admitted to the LL.M. program must already hold a J.D. or equivalent.

³ *Scientiae Juridicae Doctor*, or Doctor of Juridical Science. This is a research doctorate in law and is comparable to a Ph.D.

curriculum centers on the writing of interoffice legal memoranda in which students take on the role of a junior attorney analyzing client problems for a supervisor.

While academic legal writing programs have taken advantage of linguistic research on the texts that students are asked to write (e.g., Feak, Reinhart, & Sinsheimer, 2000; Howe, 1990), professional legal writing programs have had less opportunity to do so. As Hafner (2010) points out, professional legal genres falling into the category of 'lawyering skills' are relatively underresearched. Part of this is due to the fact that the texts that lawyers write in everyday practice largely form 'occluded genres' (Swales, 1996) that are not as easily accessible as student texts or published documents. As a result, Candlin, Bhatia, Jensen, and Langton's (2002) critique that, among the legal writing textbooks available for L2 English students, "few, if any, are premised on any type of research-based linguistic analysis of legal texts and language" (p. 300) still holds true for professional legal writing texts. Although some programs have addressed this problem by helping students learn to analyze legal texts themselves, whether through discourse analysis (Hoffman, 2011; Hoffman & Tyler, 2008) or corpus tools (Hafner, 2008; Hafner & Candlin, 2007), the majority of textbooks currently available on professional legal writing are not grounded in research-based descriptions of the genres that students are expected to produce.

When language is addressed in these textbooks, it is often in the form of a list of 'Plain English' recommendations. While these recommendations may be intuitively appealing, it remains to be seen whether the features they target actually distinguish between more or less skilled legal writers. Moreover, it is important to understand whether the quality of student writing is judged on these features or whether others may be more relevant. This study offers some preliminary answers to these questions by examining the use of two Plain English features, the passive voice and nominalizations, in expert, high-rated novice, and low-rated novice texts.

2. Literature review

2.1. The Plain English movement and traditional legal writing instruction

Since the publication of Mellinkoff's (1963) *Language of the Law*, the movement for 'Plain English' in U.S. legal writing has grown. This has influenced everything from national legislation on government language, such as the Plain Writing Act of 2010, to style guides for professionals and materials for instructing novice legal writers. Applied linguists have supported the Plain English movement in government and legal writing, applauding the use of such features for their role in enhancing textual clarity and accessibility (Kimble, 1994–1995; Tiersma, 1999; Williams, 2004) and proposing methods for teaching writers to use them (Langton, 2006; MacDonald, 2006). Further research on the responses of both judges (Flammer, 2010) and law students (Cutts, 1995) to documents expressly written to exhibit either Plain English or 'legalese' features suggests that Plain English is also preferred by readers—at least when they are directly asked to consider the style of the document.

While the research above may support the value of Plain English reforms in legal writing for society at large, it does not necessarily support their pedagogical value for learners who wish to enter the legal discourse community. Although these recommendations tend to focus on a lay audience or a decontextualized legal audience, the 'legalese' they attempt to proscribe may implicitly signal insider status (Bhatia, 1997). Since most professional legal writing does not involve publicly accessible documents, but rather texts written for legal practitioners, it is necessary to examine whether these recommendations are equally valid for insider communication. For learners who are entering this discourse community for the first time, it may be more important to know what experts in the field actually do than what they are supposed to do.

2.2. Plain English and second language legal writers

Most legal writing textbooks, whether written for L1 or L2 English writers, refer either directly or indirectly to principles of Plain English. The majority of these texts draw on the recommendations laid out by Richard C. Wydick in his book, *Plain English for lawyers* (2005), originally published in 1978 as a law review article and now perhaps the most widely used style guide in the field of legal writing (Tiersma, 1999, p. 217). His book draws on the work of Mellinkoff (1963) and his recommendations have been taken up in other legal style manuals, such as Bryan Garner's (2001) *Legal writing in Plain English*, as well. Wydick's continuing influence on legal writing materials is evident in a brief review of five popular texts (Enquist & Currie Oates, 2009; Lee, Hall, & Barone, 2007; Ramsfield, 2005; Ray & Ramsfield, 2005; Wellford Slocum, 2011), four of which are used as primary or secondary texts in the class involved in this study.

Wydick's (2005) Plain English recommendations share much with other style guidelines, such as those in Strunk and White (1959) or Orwell (1946). Some of the "language quirks" Wydick (2005) counsels against, such as "elegant variation" (analogous to lexical sophistication and complexity) and noun chains (i.e., nouns as nominal premodifiers), contradict notions of second language proficiency in academic writing, however (Biber, Gray, & Poonpon, 2011; Lu, 2011). Two other potentially problematic areas are his recommendations against the use of nominalizations and the passive voice. Nominalizations are associated with proficiency in English academic writing (Baratta, 2010; Biber, 1988; Biber, Conrad, & Reppen, 1998), and the passive voice is an important feature in written university registers, making up 20% of verb use in Biber's (2006) written academic corpus (pp. 64–65). Moreover, as Coleman (1997) points out, advising students to avoid the passive voice obscures its many important uses in legal writing, including reasons of clarity, stylistics, and rhetoric.

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