[IN PRACTICE]

TAKE THE PLAIN-ENGLISH PUSH WITH A GRAIN OF SALT

by MARTIN J. SIEGEL

Legalese has been stubbornly persistent. As Adam Freedman recounts in his book "The Party of the First Part: The Curious World of Legalese," the House of Commons passed a law banning the use of Latin and other foreign languages in legal proceedings in 1731. But when lawyers howled at this abominable leveling designed to make them sound like their unlearned clients, Parliament relented. *Habeas corpus* survived the chopping block and landed safely in the U.S. Constitution.

Ever since, great judges, legal writing teachers and plain old scolds have urged the cleansing of legal language. "Plain language" enthusiasts have recently brought the crusade to statute writing, the crafting of regulations and contract drafting. It even has its own government website: www.plainlanguage.gov.

APPELLATE ADVOCACY

When it comes to briefs, plain-language types tell lawyers to eschew Latin and other jargon except when absolutely necessary. For example, there may be no getting around *res ipsa loquitur*, but please avoid *inter alia*. Purge the "wherefore premises considereds." The witness didn't "exit the vehicle," he "got out of the car." Never send out a big word when a small one will do, and make sure lots of clauses don't drag down sentences. Make points as simply and directly as possible. Above all, don't sound like a smarty pants, and never, ever, force a judge to pick up a dictionary.

This is all good advice, which is why everyone gives it. Like most good things, though, overdoing it can cause its own problems. To understand what I mean, consider one of the simplicity mavens' premises: Writing a brief should be like yakking with a buddy. "Pretend that you're telling your story to some friends in your living room; that's how you should tell it to the court," advises writing guru Bryan A. Garner and Justice Antonin Scalia in their pithy and excellent book, "Making Your Case: The Art of Persuading Judges." U.S. District Judge Andrew Guilford also recently extolled taking a "conversational tone" in briefing in an article in the November 2010 issue of the *California Bar Journal*.

But wait, what if the friends in your living room aren't quite as erudite as Scalia's? Your BFF might pop by and ask you to dinner, to which you might say "swell," "cool," "awesome" or "dope," depending on your age. But don't use these in a brief.

Or take contractions. Living room chitchat is full of them, but many judges (my guess is most) disapprove of contractions as insufficiently formal. Some judges known as superlative writers use contractions in their writing. Other equally acclaimed stylists, like Scalia, are on record as finding them unprofessional. Depending on the judge, thinking of a brief as a talk with friends can lead to trouble — or at least uncertainty about which informalities add punch and which take liberties.

The ban on Latin and longer words also can go too far. UCLA School of Law professor and blogger Eugene Volokh has created a list of 133 words and phrases to blot out of briefs. Helpfully, he provides replacements. Some of his targets are no-brainers, like "aforementioned" and "forthwith." But is he right to always prefer "get" to "acquire," "more" to "additional," "try" to "attempt," "change" to "modify," and "keep" to "retain"?

No. Varying word choice and using synonyms avoids the monotony of repetition and injects life and color, even if it means adding syllables now and then. Some legalese will even shorten writing. *Inter alia* and *sub judice* use fewer words or characters than "among other things" and "under consideration." Every judge knows what these terms mean.

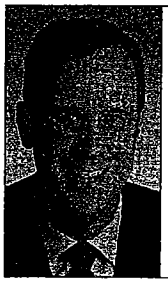
Think Independently

So, lawyers should take the ubiquitous advice on simplicity and legalese, but add a grain of salt. Avoid silly archaism but not variety. Be clear but not boring. A conversational tone is often good, but pretend the chat is with a respected former professor, not a younger brother. Be wary of language police and lists of officially approved words. The number required on the cover of briefs denotes membership in the State Bar, not the Hemingway Society. One size does not have to fit all lawyers and every brief.

Lawyers write briefs primarily for other lawyers, after all. While no audience enjoys fustiness and bloviation, brief writers can count on their readers sharing a specialized vocabulary, training and level of sophistication. As Barbara H. Goldman, one lawyer who laments the "verbal witch hunt" of some anti-jargon campaigners, puts it in the November 2004 issue of the *Michigan Bar Journal*, "Plain English, yes. Pale English, no."

Finally, if lawyers should bring a little skepticism to the perennial war on legalese, judges could use a little more fervor. Much of the advice dispensed to lawyers about how to write comes from judges, and lawyers first learn legal prose by reading judicial opinions. More importantly, judges write for the general public, unlike lawyers. The comprehensibility of judicial decisions is an important public good.

Yet a study in the forthcoming fall 2011 issue of the *Journal of Appellate Practice and Procedure* contains a surprising result. Authors Lance N. Long and William F. Christensen examine the "readability" — defined as shorter sentences and words — of briefs and opinions. They found that opinions are even less readable than briefs, with dissents least readable of all. Some teaching by example may be in order. TXL



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